









NORTH CAROLINA
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FUS L. EDMISTEN
TORNEY GENERAL



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NORTH CAROLINA
ATTORNEY GENERAL
REPORTS

Opinions of the Attorney General
July 1, 1975 through December 31, 1975

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8 July 1975

Subject: Motor Vehicles; Equipment and Construction; Use of Red Lights

Requested by: Mr. T. Perry Jenkins
Law Enforcement Legal Advisor
Region L, Council of Governments

Questions: (1) Does the sheriff or chief of police have authority to regulate who among the members of a (a) volunteer fire department or (b) rescue squad may have and use red lights on their private vehicles?

(2) When and under what circumstances may the sheriff or chief of police regulate the use of red lights by members of voluntary fire and rescue units on their private or personal vehicles?

Conclusions: (1) Firemen are permitted under the provisions of G.S. 20-130.1 to use red lights on their personal or private vehicles so long as the red light is activated only in the performance of their duty. Red lights are approved only for rescue squad vehicles owned and operated by the rescue squad while on rescue squad business. No members of rescue squads except chiefs and assistant chiefs, as provided by G.S. 20-125(b), may use red lights on their private cars.

(2) G.S. 20-130.1 allows these red lights to be used by firemen on their personal vehicles so long as they are activated only while in the performance of their duty as firemen while answering a fire call. That portion of G.S. 20-130.1 (hereinafter set out) relating to local police approving

equipment owned by life saving organizations was or appears to have been repealed by the enactment of Article 56 of Chapter 143 (Emergency Medical Services Act of 1973) which places the responsibility for approval of emergency service equipment in the Department of Human Resources.

G.S. 20-130.1 reads as follows:

"§ 20-130.1. *Use of red lights on front of vehicles prohibited; exceptions.* - It shall be unlawful for any person to drive upon the highways of this State any vehicle displaying red lights visible from the front of said vehicle. The provisions of this section shall not apply to police cars, highway patrol cars, vehicles owned by the Wildlife Resources Commission and operated exclusively for law-enforcement purposes, ambulances, fire-fighting vehicles, school buses, a vehicle operated in the performance of his duties or services by any member of a municipal or rural fire department, paid or voluntary, or vehicles of a voluntary life-saving organization that have been officially approved by the local police authorities and manned or operated by members of such organization while on official call or vehicles operated by medical doctors and anesthetists in emergencies or to such lights as may be prescribed by the Interstate Commerce Commission. The provisions of this section shall not apply to motor vehicles used in law enforcement by the sheriff or any salaried deputy sheriff or salaried rural policeman of any county, regardless of whether or not the vehicle is owned by the county."

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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8 July 1975

Subject: Motor Vehicles; Requirements; Bikes with
Helper Motors

Requested by: Colonel E. W. Jones
Commander
N. C. State Highway Patrol

Question: Must a pedal bicycle with a helper motor
having a speed capacity in excess of 20
miles per hour meet the requirements of
a motorcycle?

Conclusion: Yes.

G.S. 20-50.1 specifically requires that such vehicles be incapable of exceeding 20 miles per hour in order to be exempt from all title and registration requirements of Chapter 20. Unless this standard is met, then the vehicle cannot be exempt and would be treated as a motorcycle.

Likewise, such a bicycle must meet the operation and equipment standards of a motorcycle if it can exceed the speed of 20 miles per hour. The definition of a motorcycle under G.S. 20-4.01(27)d, as amended by 1975 Amendment, Chapter 94, exempts bicycles with helper motors only if their maximum speed is 20 miles per hour. Otherwise, they shall be classified as motorcycles and subject to all the requirements in Chapter 20 that concern motorcycles.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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11 July 1975

Subject: Motor Vehicles; Driver's License; Bikes
with Helper Motors

Requested by: Ms. Sarah F. Patterson
Assistant District Attorney
Seventh Solicitorial District

Question: Is a motor vehicle operator's license required to operate a bike equipped with a helper motor of less than one brake horsepower on the highways and streets?

Conclusion: No.

Chapter 859 of the 1975 Session Laws of North Carolina amends G.S. 20-4.01(23) and G.S. 20-8 and effectively exempts persons over the age of 16 years from the driving license requirements.

The pertinent portions of G.S. 20-4.01(23) and G.S. 20-8, after amendment, read as follows:

"§ 20-4.01. *Definitions.*—Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings:

* * *

(23) *Motor Vehicle.*—Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour."

"§ 20-8. *Persons exempt from license.*—The following are exempt from license hereunder:

* * *

(7) Any person who is at least 16 years of age and while operating a bicycle with a helper motor rated

less than one brake horsepower which produces only ordinary pedaling speeds up to a maximum of 20 miles per hour."

This opinion modifies the prior Opinion of this office dated 8 May 1975 to Ms. Sarah F. Patterson, Assistant District Attorney, Seventh Solicitorial District, insofar as same held that a motor vehicle operator's license was required to operate bicycles with helper motors.

It should be noted that operators of bicycles with helper motors are subject to the rule of the road as set forth in Chapter 20 of the North Carolina General Statutes, except those rules which by their nature can have no application.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

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15 July 1975

Subject: Public Officers and Employees; Double Office Holding; Appointment to County Board of Social Services of Individual Who is Member of County Board of Education and Municipal Employee

Requested by: Mr. Michael S. Kennedy
Attorney for Cleveland County
Department of Social Services

Question: May an elected member of the school board of a county who is also a regular employee of a municipality within the county be appointed as a member of the County Board of Social Services?

Conclusion: Absent a conflict of interest under G.S. 14-234, the individual described may

be appointed as a member of the county board of social services.

Inasmuch as G.S. 128-1.1, *inter alia*, permits concurrent holding of an elective and appointive office, place of trust or profit, this question was apparently posed due to the individual's employment by the municipality. The main concern here appears to be whether this individual's regular employment for compensation can be construed as a "...place of trust or profit" in local government.

The terminology "office" and "place of trust or profit", as found in the State Constitution and statutes, are in all essential respects identical. *Groves v. Barden*, 169 N.C. 8 (1915). The terms are designed to denote positions occupying the same level of dignity and importance, with the latter terminology being utilized to prevent evasion resulting from attributing overly technical meaning to the word "office". *State ex rel Wooten v. Smith*, 145 N.C. 476 (1907).

Thus, in determining if the position in question here is a place of trust or profit, the following language of the Supreme Court of North Carolina would be applicable:

"Our Court is in line with the current of authority, having adopted and approved the definition of an office, that it is 'a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public,' and saying further: 'The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the Government.' *S. v. Smith*, 145 N.C., 477. If, therefore, there is no constitutional classification of offices and employments, and a duty is imposed upon the incumbent of a position which requires him to perform a legislative, executive, or judicial act, he is a public officer, and otherwise an employee; and in determining the nature of the duty, the fact that the lawmaking power may have declared the position an office or an employment, although not

conclusive, is entitled to consideration." *Groves v. Barden*, *supra*, at pages 9-10.

If, under the above guidelines, the individual concerned can be realistically classified as an employee, then his appointment to the county board of social services falls outside the prohibition on dual office holding set forth in G.S. 128-1.1. Of course, care should be exercised to insure that this appointment will not fall afoul of the proscription against conflict of interest as contained in G.S. 14-234.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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15 July 1975

Subject: Mental Health; Courts; Infants and
Incompetents; Voluntary Admission of a
Minor to a Treatment Facility

Requested by: Dr. N. P. Zarzar
Director
Division of Mental Health Services
Department of Human Resources

Question: Does the United States Supreme Court
Decision in *O'Connor v. Donaldson*, _____
U.S. _____, 43 L.W. 4929 (1975) require
a finding that a minor is dangerous to
himself or others in order to justify his
retention in a treatment facility pursuant
to G.S. 122-56.7?

Conclusion: The United States Supreme Court Decision
in *O'Connor v. Donaldson*, _____ U.S.
_____, 43 L.W. 4929 (1975) does not
require a finding that a minor is dangerous
to himself or others in order to justify his
retention in a treatment facility pursuant
to G.S. 122-56.7.

Article 4, North Carolina General Statutes, provides for voluntary admission to a treatment facility upon application by an individual who "is in need of treatment for mental illness or inebriety." See G.S. 122-56.3. In the case of a minor, the application for admission is made by a parent, person standing in *loco parentis*, or guardian. G.S. 122-56.5.

While not altering the statutory provisions for voluntary admission of minors, the 1975 General Assembly enacted the following legislation (effective July 1, 1975) further protecting minors:

"§ 122-56.7. *Judicial determination.*-(a) A hearing shall be held in district court in the county in which the treatment facility is located within 10 days of the day a minor or a person adjudicated non compos mentis is admitted to a treatment facility pursuant to G.S. 122-56.5.

(b) The court shall determine whether

(1) such person is mentally ill or inebriate and

(2) is in need of further treatment at the treatment facility.

(c) The initial hearing and all subsequent proceedings shall be governed by the involuntary commitment procedures of Chapter 122, Article 5A of the General Statutes. Provided that in a case involving an indigent respondent, located at a regional psychiatric facility for the care and treatment of the mentally ill and inebriate, special counsel authorized by G.S. 122-58.12 shall act as his counsel at the initial hearing."

While providing the additional procedural safeguards afforded in involuntary commitment cases, the General Assembly clearly did not intend to require a finding of dangerousness in order to retain a voluntarily admitted minor in a treatment facility. However, with the advent of the decision in *O'Connor v. Donaldson* (decided June

26, 1975), apparently concern has arisen as to the standards set forth in the new statute. More specifically, the position has been advanced in some circles that, in order to justify retention of a minor in a treatment facility, there must be a finding of dangerousness, in addition to or as opposed to the fundamental findings of mental illness or inebriety and need for treatment.

Close reading of the decision in *O'Connor* reveals that the author of the majority opinion took great pains to point out the following limitations on the applicability of the decision:

"We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or *to alleviate or cure his illness....*

* * *

A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and *can live safely in freedom....*

* * *

In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends...." (Emphasis supplied)

Initially, of course, the *O'Connor* decision dealt with an adult. Notwithstanding the present trend toward recognition of the rights

of minors—to include such constitutional rights as equal protection and due process—it is generally recognized that some variations from those rights as afforded adults is necessary and desirable. Cf. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). In the present context, several very valid bases for different standards for the admission of minors to treatment facilities readily come to mind. Among these are the necessity to provide hospitalization and treatment for the mentally ill who are too young to seek or obtain help for themselves, the parental interest in and, indeed, legal responsibility for obtaining help for mentally ill children regardless of a child's recognition of such need, and the therapeutic desirability of affording mental health care at an early age so as to enhance the possibility of its success.

The need for separate rules for voluntary admission of children is emphasized by the basic fact that, absent separate provisions tailored to the needs of juveniles, unwilling children who are mentally ill and in need of treatment but whose situations are not so aggravated that they are "dangerous to themselves or others" would not be accorded the needed in-patient treatment. This would be true despite the intelligent and informed conclusions of "willing and responsible family members" that a child is desperately in need of treatment or his mental illness.

Finally, the Supreme Court unequivocally pronounced that *O'Connor* is authority only for a situation involving "not involuntary treatment but simply involuntary custodial confinement." See opinion cited, footnote 10. Significantly, within this context, the North Carolina Statutes require: (a) a judicial finding that the minor is in need of further *treatment at the treatment facility* (G.S. 122-56.7); (b) full protection of the minor's rights at the judicial hearing and the mandated periodic judicial rehearings (G.S. 122-56.7 and G.S. 122-58.7); (c) appropriate mental and physical treatment while the minor is in the facility (G.S. 122-55.6); and (d) justification for any restriction upon the exercise of the minor's statutorily guaranteed civil rights during the treatment period (G.S. 122-55.14). Thus, it is obvious that the statutory provision for treatment of minors under consideration here is something totally different from the involuntary custodial confinement addressed by the recent Supreme Court Decision.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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22 July 1975

Subject: Mental Health; Voluntary Admissions;
Requirement for Rehearings for Minors and
Persons Adjudicated *Non Compos Mentis*;
Requirement for a Hearing Under
G.S. 122-56.7 When Patient in a
Treatment Facility Is Adjudicated *Non
Compos Mentis*

Requested by: Mr. John L. Pinnix
Special Counsel
Broughton Hospital

Questions: (1) When a patient at a North Carolina
treatment facility falls within the
provisions of G.S. 122-56.7, are the
rehearings described in G.S. 122-58.11
required in order to retain him in the
treatment facility longer than ninety days?

(2) When a patient has been voluntarily
admitted to a North Carolina treatment
facility and subsequently is adjudicated
non compos mentis and a guardian
appointed under G.S. 35-3, must a hearing
be held in accordance with G.S. 122-56.7?

Conclusions: (1) Yes.
(2) Yes.

G.S. 122-56.7 requires that a district court hearing be held within
ten days after the voluntary admission to a treatment facility of
a minor or a person who has been adjudicated *non compos mentis*.

Subsection (c) of this statute further provides as follows:

"The initial hearing and *all subsequent proceedings* shall be governed by the involuntary commitment procedures of Chapter 122, Article 5A of the General Statutes...." (Emphasis supplied)

This language makes it clear that the General Assembly intended that the G.S. 122-58.11 requirement for periodic rehearings in involuntary commitment proceedings be equally applicable to the individuals described in G.S. 122-56.7.

G.S. 122-56.3 requires the discharge of any voluntarily admitted patient within seventy-two hours of his written request therefor. The obvious purpose behind G.S. 122-56.7 is to protect minors and those adjudicated *non compos mentis* who have already been admitted to a treatment facility from any unnecessary or unduly prolonged detention. This protection can only be provided by affording the same type of hearing to the patient who is adjudicated *non compos mentis* after, rather than before, admission to a treatment facility.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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22 July 1975

Subject: Department of Human Resources;
Appointment of Director of Youth Services

Requested by: Mr. David P. Dickey
Acting Director of Planning
Division of Youth Development
N. C. Department of Correction

Question: Must the procedures set forth in
G.S. 134-10 be followed in order to
appoint the Director of Youth Services?

Conclusion: Yes.

In Chapter 742, 1975 Session Laws, the General Assembly acted to completely separate the "administration of training schools for committed delinquents from the adult correction system." G.S. 134-1. The General Assembly elected not to transfer the Division of Youth Services (the component part of the Department of Corrections which had previously been the responsible agency) intact by a Type II transfer under G.S. 143A-6. Instead, the method of separation was via transfer of all physical facilities, equipment, supplies, personnel, etc., to the Department of Human Resources. See G.S. 134-6.

The new legislation then went on to provide for the areas and method of operation of this function and delineated the responsibilities for the operation. A Commission of Youth Services was created to serve specified functions within the Department of Human Resources. G.S. 134-3 through G.S. 134-9. Also created was a position of Director of Youth Services, with the manner of appointment to this position and the duties to be performed by the incumbent being set forth with great specificity. See G.S. 134-10 through G.S. 134-14.

Apparently some consideration has been given as to whether the prior Director of Youth Development could automatically be considered as transferred to the new position of Director of Youth Services. In view of the method of transfer used by the General Assembly and the specific selection procedures prescribed in G.S. 134-10, that statute must be complied with in the appointment of an individual to this newly created position of Director of Youth Services.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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13 July 1975

Subject: Health; Ground Absorption Sewage
Disposal System Act of 1973; Article 13C

of Chapter 130; Adoption of Rules and Regulations by Local Boards of Health; Effect of Rules and Regulations Adopted by the Commission for Health Services

Requested by:

Mr. Howard B. Campbell, M. P. H.
Director
Pasquotank-Perquimans-Camden-Chowan
District Health Department

Question:

May the rules and regulations of a local board of health permit the installation of a septic tank system or an alternative ground absorption sewage disposal system in soil which has been determined to be "unsuitable"?

Conclusion:

The rules and regulations of a local board of health may permit the installation of a septic tank system or an alternative ground absorption sewage disposal system in soil classified as "unsuitable" if such installation will not have a detrimental effect on the public health. However, after the effective date of the rules and regulations of the Commission for Health Services governing sewage disposal, the provisions of such rules may apply.

The General Assembly declared in the preamble to the Ground Absorption Sewage Disposal System Act of 1973 (codified as Article 13C of the General Statutes' Chapter 130) that:

"...continued installation, at a rapidly and constantly accelerating rate, of septic tanks and other types of ground absorption sewage disposal systems in a faulty or improper manner and in areas where unsuitable soil and population density adversely affect the efficiency and functioning of these systems has a detrimental effect on the public health through contamination of the groundwater supply....the General Assembly

intends hereby to insure the regulation of ground absorption sewage disposal systems so that such systems may continue to be used, where appropriate, without jeopardizing the public health."

The General Assembly provided in section 5(b) of the Act (codified as G.S. 130-166.25(b)) that:

"The local health department shall issue an improvements permit authorizing work to proceed and the use of a septic tank or other ground absorption disposal system when it has determined, after a field investigation of the area, including such factors as character and porosity of soil, percolation rate, topography, depth to water table and rock or other impervious formations and location or proposed location of any water supply wells, that such a system can be installed at the site in compliance with the rules and regulations of the local board of health governing such installations;...."

The ground Absorption Sewage Disposal Act recognizes that "ground absorption sewage disposal can be rendered ecologically safe" and "will continue to be necessary for the adequate and economic housing of an expanding population," provides a procedure for obtaining an improvements permit and a certificate of completion, stipulates the factors to be considered before issuance of an improvements permit, and entrusts issuance of the improvements permit to the local health department upon compliance with the rules and regulations of the local board of health. Therefore, the regulation of the installation and use of ground absorption sewage disposal systems rests ultimately on the rules and regulations of the local board of health. The question presented herein is whether or not State law requires the rules and regulations of local boards of health concerning ground absorption sewage disposal systems to provide a minimum criteria for issuance of an improvements permit and, ultimately, whether or not State law requires the local boards of health to adopt rules and regulations in the first instance concerning ground absorption sewage disposal systems.

G.S. 130-17 sets forth the powers and duties of local boards of health. "The local boards of health shall have the immediate care

and responsibility of the health interests of their city, county or district." "The local boards of health shall make such rules and regulations, not inconsistent with law, as are necessary to protect and advance the public health." The quoted provisions of G.S. 130-17 make it clear that the local boards of health are given the primary duty to protect the public health within their jurisdictions and the power to make rules and regulations to fulfill this duty. The second quoted provision not only confers but also mandates the exercise of this rule-making authority "when necessary to protect and advance the public health." The delegation of any rule-making authority confers the discretion to adopt rules and regulations in accordance with standards provided by the legislature. The discretion of a local board of health under G.S. 130-17 pertains to, first, whether the public health requires the adoption of rules and regulations on a particular matter and, second, to what extent does the public health require regulation of the particular matter. If the protection and the advancement of the public health require regulation of a particular matter, then the local board of health shall make such rules and regulations.

The General Assembly has found that continued installation of ground absorption sewage disposal systems in a faulty or improper manner or in areas of unsuitable soil or population density has a detrimental effect on the public health. The General Assembly expressed its intent that the Ground Absorption Sewage Disposal Act insure the regulation of ground absorption sewage disposal systems. This regulation, as noted previously, is predicated on rules and regulations adopted by the local boards of health. Consequently, it is the opinion of this Office that the Ground Absorption Sewage Disposal System Act of 1973 and the provisions of G.S. 130-17 mandate the adoption of rules and regulations concerning ground absorption sewage disposal systems. Such rules and regulations have been found by the General Assembly to be necessary to protect and advance the public health.

The question remains, however, whether the rules and regulations adopted by the local board of health, may permit the installation of a septic tank system in a soil classified as "unsuitable." It has been noted that the authority and responsibility to adopt regulations includes the discretion to determine the extent and content of the regulation adopted. The Act stipulates the factors to be considered

establishes the protection of the public health as the polar star for the regulations, but entrusts specific determinations to the local health department in accordance with the rules and regulations of the local board of health. Therefore, the local board of health, through its rules and regulations, may determine that the installation of a septic tank system or an alternative ground absorption sewage disposal system in a soil classified as "unsuitable is permissible when the application of the latest advancements in sanitation engineering and the results of appropriate engineering, hydrogeological and soil studies on the particular tract of land demonstrate that the operation of the ground absorption sewage disposal system will satisfy the general requirements of the rules and regulations and will not have a detrimental effect on the public health. This judgment has been entrusted to the discretion of the local boards of health.

It must be noted that the Act in 5(b) (codified as G.S. 130-166.25(b)) provides that it "does not limit or interfere with the authority of the Department of Human Resources to adopt and enforce reasonable rules and regulations under authority of G.S. 130-160." G.S. 130-160 authorizes the Commission for Health Services to adopt rules and regulations governing sewage disposal systems with 3,000 gallons or less design capacity.

The Commission for Health Services has recently exercised the authority conferred by G.S. 130-160 and adopted Rules and Regulations Governing the Disposal of Sewage from any Residence, Place of Business or Place of Public Assembly in North Carolina. These rules and regulations will become effective, after adoption by the Environmental Management Commission, on September 1, 1975, Part I, Section IVB3 of the rules and regulations provide:

"Sites classified as *UNSUITABLE* shall not be used for soil absorption disposal systems, unless engineering, hydrologic, and soil studies indicate to the State or local agency that a suitable septic tank system or a suitable alternate system can reasonably be expected to function satisfactory."

G.S. 130-17(b) provides that the rules and regulations of local boards of health may be more stringent, but not less stringent, than those of the Commission for Health Services where an emergency

or a peculiar local condition or circumstance so require; otherwise the rules and regulations of the Commission for Health Service prevail where there is a conflict between rules of the Commission and rules of the local board of health. Therefore, it is apparent that, except where an emergency or a peculiar local condition or circumstance exists, the provisions of Part I, Section IVB3 will prevail over conflicting local rules. These provisions will also apply where local rules do not address the question. Consequently, after the effective date of the new rules and regulations of the Commission for Health Services, the provisions of Part I, Section IVB3 will, except in limited instances, determine when a septic tank system or an alternative ground absorption sewage disposal system may be installed in soils classified as "unsuitable."

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Associate Attorney

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23 July 1975

Subject: Mental Health; Mental Health Clinics
Expenditure of Fees Collected for Services
by Local Mental Health Clinics

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
N. C. Department of Human Resources

Question: Is there any limitation on the expenditure
of funds which have been collected as fees
for services rendered by local mental health
clinics?

Conclusion: Fees for services rendered which have been
collected by local mental health clinics may
be expended only for the fiscal operation
of the local mental health authority.

G.S. 122-35.10 provides for the collection of fees for services rendered by local mental health clinics. The duty and obligation to effect this type of collection and the legislative intent behind the statutory requirements for the collections have been discussed in a previous opinion of this Office. See opinion of the Attorney General to Mr. R. J. Bickel, Assistant Director for Administration, Division of Mental Health Services, dated 13 May 1975, 44 N.C.A.G. 28.

In addressing the subject of the disposition of the fees which are collected, G.S. 122-35.10 provides:

"The fees to be charged are to be fixed by the local mental health authority and all funds so collected shall be utilized for the fiscal operation of the local mental health authority."

This unequivocal language permits no doubt as to circumscribed limits placed upon the use of the fees collected by local mental health clinics.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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August 1975

Subject:	Motor Vehicles; Drivers' Licenses; Limited Driving Privilege; Effective Date, Cases to Which Act Applies
Requested by:	Honorable William H. McMillan N. C. House of Representatives
Questions:	(1) Does this act apply to offenses committed before its effective date in which the trial is held after the effective date?

(2) Does the act apply to cases in which the offense occurred and the trial was held before the effective date and in which no appeal was taken?

(3) Does the act apply to cases where the offense occurred and trial was held in the district court before the effective date and in which an appeal to the superior court was pending on the effective date of the act?

(4) Does the act apply to cases in which the offense occurred, trial in the district court and in the superior court were held before the effective date, and in which an appeal to the Court of Appeals was pending on the effective date?

Conclusions:

(1) The act applies to offense committed before July 1, 1975, in which trial is held after July 1, 1975, and such defendants are eligible to receive a limited driving privilege if the trial judge, in his discretion, determines to allow it.

(2) The act does not apply to cases in which the offense occurred and final judgment was entered before July 1, 1975 with no appeal being taken and such persons are not eligible to receive a limited driving privilege.

(3) The act applies to offense committed and tried in the inferior court prior to July 2, 1975, but which are pending appeal to the superior court on July 1, 1975, and such persons are eligible to receive a limited driving privilege if the superior court judge in his discretion determines to allow it.

(4) The act will not apply to cases where the offense and trial occurred prior to July 1, 1975, which are pending on appeal to the Court of Appeals or the Supreme Court unless the Appellate Division reverses the conviction and remands the case to the superior court for a new trial.

Chapter 763, Session Laws of 1975, authorizes trial judges to allow, as a condition of a suspended sentence, a limited driving privilege to persons convicted of a first offense of violating N.C.G.S. 20-16.1(a). The allowance of such a limited privilege is not mandatory but is in the discretion of the trial judge. The effective date of the act was July 1, 1975. It contains no provision respecting pending litigation.

The revocation of driving privilege is not a part of the punishment for driving while under the influence. *Harrell v. Scheidt*, 243 N.C. 35 (1956), *Joyner v. Garrett, Comr. of Motor Vehicles*, 279 N.C. 26 (1971). Likewise the allowance of a limited driving privilege could not appear to be a part of the punishment for the offense.

Nonetheless these matters are direct effects of the conviction and closely related to it that the principles of *State v. Pardon*, 272 N.C. 72 (1967) are considered analogous. Therein it is said:

"Statutes are frequently adopted which change the degree and kind of punishment to be imposed for a criminal act.

* * *

The legislature may always *remove* a burden imposed upon citizens for State purposes....

* * *

An amendatory act which imposes a lighter punishment can be constitutionally applied to acts committed before its passage.

When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply....

* * *

'As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.'

No court has the authority to change or modify its judgment after the terms in which it was rendered has expired. *State v. Warren*, 92 N.C. 825 (1885), *State v. McLeod*, 222 N.C. 142 (1941); *State v. Lawrence*, 264 N.C. 220 (1965); N.C.A.G. Opinion, 12/18/66; Ralph L. Howland, North Carolina Commissioner of Motor Vehicle

In *State v. Pardon*, 272 N.C. 72 (1967), it is said:

"After a defendant, who did not appeal, has begun serving his sentence, a change or repeal of the law under which he was convicted does not affect his sentence absent a retrospective provision in the statute."

Chapter 763 contains no retrospective provision.

An appeal from an inferior court to the superior court nullifies the action of the inferior court; it "completely annuls" the judgment. *State v. Goff*, 205 N.C. 545 (1933); *State v. Meadows*, 234 N.C. 657 (1951); *State v. Broome*, 269 N.C. 661 (1967); *State v. Stille*, 4 N.C. App. 638 (1969); *State v. McCluney*, 280 N.C. 404 (1972).

The term "conviction" in the motor vehicle laws means a "final conviction". G.S. 20-24(c). In this situation, there is no final

conviction and the superior court is not restricted in its actions in the matter. However, the jurisdiction of the inferior court which rendered judgment is at an end and it cannot alter its judgment in the matter.

The appeal to the Appellate Division ousts the jurisdiction of the superior court and the superior court can issue no substantive orders in the matter so long as a court of the Appellate Division retains jurisdiction. *Clark v. Cagle*, 226 N.C. 230 (1946).

If the Appellate Division affirms the judgment appealed from, the superior court is thereafter customarily powerless to enter any judgment other than that affirmed. The decision of the Appellate Division effectively ends the matter although it is the custom to enter a *pro forma* judgment in superior court after certification of the decision; however, in light of the holding in *State v. Spencer*, 276 N.C. 535 (1970), it would appear that a request could be made upon entry of the *pro forma* judgment in the trial court for a limited driving permit as it would be to the benefit of the licensee.

"It is the practice of the superior court to enter judgment in accordance with the opinion of this Court—a practice which should be continued in the interest of clarity, continuity, and for the convenience of those who may examine the records thereafter—, but the efficacy of our mandate does not depend upon the entry of an order by the court below. Where such an order has been entered it 'neither added to nor took from the rights of either party.' *Strickland v. Jackson*, 260 N.C. 190, 191, 132 S.E. 2d 338, 339." *D & W. Inc., v. Charlotte*, 268 N.C. 720 (1966).

On the other hand, the conviction is reversed, and a new trial granted, the defendant, if convicted at the new trial, would be entitled to the benefit of the act, if in the discretion of the trial judge, he is considered deserving.

Rufus L. Edmisten, Attorney General
William W. Melvin
Assistant Attorney General

5 August 1975

Subject: Social Services; Adoptions; Chapter 335 of the 1975 Session Laws; Act to Prohibit the Buying and Selling of Children for Adoption and to Prohibit Advertisements Soliciting Children for Adoption

Requested by: Dr. Renee P. Hill, Director
Division of Social Services
Department of Human Resources

Question: Under Chapter 335 of the 1975 Session Laws, effective July 1, 1975, prohibiting the buying and selling of children for adoption, may prospective adoptive parents pay the transportation expenses to North Carolina as well as all medical costs incident to the birth of the child of an expectant mother residing in another state who is considering placing her baby for adoption with this couple?

Conclusion: Prospective adoptive parents who enter into the above type of financial arrangement with an expectant mother pursuant to an independent adoption placement expressly violate the provisions of Section 1, Chapter 335 of the Session Laws of 1975 prohibiting the buying and selling of children for adoption.

Section 1 of Chapter 335 of the 1975 Session Laws, effective July 1, 1975, provides:

"No person, agency, association, corporation, institution, society or other organization, except a licensed child-placing agency as defined by G.S. 48-2(2), or a county department of social services, *shall offer or give, charge or accept any fee, compensation, consideration or thing of value for*

receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption....Any person who violates any provision of this section shall be guilty of a misdemeanor, and upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court...." (Emphasis supplied)

The specific factual situation posed involves an expectant mother, residing in another state, who is considering placing her baby for adoption independently with a North Carolina family. The prospective adoptive parents are proposing to pay for the woman's transportation to North Carolina as well as her room, board, and medical care after she arrives. The inquiry is as to whether this arrangement would fall within the purview of the proscription against buying and selling children for adoption as set forth in Chapter 335.

In our opinion the type of arrangement contemplated in this case is clearly violative of the provisions of Section 1 of Chapter 335. Is there any real doubt that the prospective adoptive parents *are offering or giving compensation, consideration or a thing of value* to the expectant mother for receiving her child for adoption? We think not.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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5 August 1975

Subject: Mental Health; Voluntary Admissions;
Release From Treatment Facility of a
Minor or an Incompetent Prior to or After
a Judicial Hearing Under G.S. 122-56.7

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
N. C. Department of Human Resources

Questions:

In the case of a child (or person adjudicated *non compos mentis*) who is admitted to a treatment facility pursuant to G.S. 122-56.5:

- (1) Can the parent or guardian request and obtain the release of the patient prior to the hearing required by G.S. 122-56.7?
- (2) Can the parent or guardian request and obtain the release of the patient after the hearing under G.S. 122-56.5 when the court has determined that the patient is mentally ill or inebriate and is in need of further treatment at the treatment facility?
- (3) If the patient is released from the treatment facility before the hearing under G.S. 122-56.5 must the hearing still be conducted?

Conclusions:

In the situations described:

- (1) The parent or guardian can request and obtain the release of the patient.
- (2) The parent or guardian cannot obtain the release of the patient contrary to the court order.
- (3) The hearing is not required to be convened.

Article 4 of Chapter 122 of the General Statutes permits the voluntary admission of a minor or an incompetent into a North Carolina treatment facility upon application by responsible parent, guardian, etc. In these instances, however, G.S. 122-56.7 requires a judicial hearing within ten days of admission. This hearing is patently designed to protect the minor or incompetent from being *improperly restrained* in the treatment facility if that degree of restraint is not therapeutically necessary.

Since the parent or guardian, as applicable, is still the person basically responsible for the welfare of the patient, he may authorize the release of the patient prior to the judicial hearing. Patently, in that situation, since there is no longer any restraint imposed upon the patient, the question of the propriety of the restraint is moot; thus, no hearing is required.

However, once the court has conducted a hearing and has ordered inpatient treatment, the court order is controlling on that question. Thereafter, discharge of the patient from the treatment facility is governed by the provisions of Article 5A, Chapter 122.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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5 August 1975

Subject: Mental Health; Involuntary Commitment;
Interstate Compact on Mental Health;
Transfer of Mental Patient to a State Not
Having Same Due Process Requirements As
North Carolina

Requested by: Mr. John L. Pinnix
Special Counsel
Broughton Hospital

Question: Under G.S. 122-99 (Interstate Compact on
Mental Health), may the State of North
Carolina constitutionally transfer an
inpatient involuntarily committed under
the provisions of G.S. 122-58.1 through
G.S. 122-58.18 to another state not having
equivalent due process safeguards in the
form of requirements for mandatory,
periodic judicial rehearings?

Conclusion: The transfer described is not prohibited
although the existence of adequate due

process safeguards in the receiving state should be an important factor for consideration in determining the appropriateness of the transfer of the patient.

G.S. 122-58.1 through G.S. 122-58.18 provide for the involuntary commitment in North Carolina of individuals who are mentally ill or inebriates and who are dangerous to themselves or others; among other statutorily provided due process safeguards are the requirements for regular and periodic rehearings as a prerequisite to continuing these individuals in an inpatient status. Through the Interstate Compact on mental health (codified as G.S. 122-99) North Carolina has agreed with other subscribing states as to the basis rules governing the interstate transfer of patients where this action is appropriate.

The self pronounced intent and purpose behind the Compact is as follows:

"The party states find that the proper and expeditious treatment of the mentally ill and mentally deficient can be facilitated by cooperative action, to the benefit of the patients, their families, and society as a whole.... Consequently, it is the purpose of this Compact and of the party states to provide the necessary legal basis for the institutionalization or other appropriate care and treatment of the mentally ill and mentally deficient under a system that recognizes the paramount importance of patient welfare and to establish the responsibilities of the party states in terms of such welfare." (Article I of the Compact).

In addressing the subject of transfer of persons needing inpatient treatment, Article III of the Compact contains the following significant language:

"...any patient may be transferred to an institution in another state whenever there are factors based upon clinical determinations indicating that the care and

treatment of said patient would be facilitated or improved thereby.... The factors referred to in this paragraph shall include the patient's full record with due regard for the location of the patient's family, character of the illness and probable duration thereof, and such other factors as shall be considered appropriate."

Nowhere in the Compact or in any of the General Statutes of North Carolina is there a requirement that the receiving state must have statutes identical to or equivalent to those of the sending state. It would appear that the usual situation wherein consideration is given to an interstate transfer involves a proposal to transfer the patient to his state of permanent residence or to an area where he will be near family or friends. In weighing the pros and cons of an individual transfer, the therapeutic value of the transfer, the projected duration of the inpatient status, and the due process protection afforded the patient in the receiving state are all valid factors for consideration in arriving at a decision as to the course which will be most likely to insure the particular patient's welfare.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Assistant Attorney General

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8 August 1975

Subject: Prisons and Prisoners; Paroles; Parole Eligibility

Requested by: Mr. Jack Scism, Chairman
North Carolina Parole Commission

Question: May the Parole Commission grant parole to persons who have served less than one-fourth of their sentence?

Conclusion: No.

N.C.G.S. 148-58 provides:

"All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence, if their sentence is determinate, and a fourth of their minimum sentence, if their sentence is indeterminate; provided, that any prisoner serving sentence for life shall be eligible for such consideration when he has served 20 years of his sentence. Nothing in this section shall be construed as making mandatory the release of any prisoner on parole, but shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its merits."

If the Legislature intended that the Parole Commission could release an inmate at any time after commitment, why did it provide for determinate and indeterminate sentences, and why did it provide for eligibility upon service of a fourth of a minimum sentence, or after twenty years of a life sentence, which is a fourth of the eighty-year definition of a life sentence, G.S. 14-2? If the construction were adopted that the Parole Commission could release an inmate at any time after commitment, all sentences would be indeterminate - one day to the maximum imposed by the court, and there would be no reason for a minimum sentence, and the sentencing court would, in effect, be imposing a maximum sentence which would automatically become indeterminate under the construction proposed in this inquiry.

The reason and language of G.S. 148-58 can only point to one conclusion, and that is that a prisoner must serve one fourth of his sentence before the Parole Commission has jurisdiction over his person and the authority to release him on parole.

We are therefore of the opinion that G.S. 148-58 grants the Parole Commission the power to parole inmates only after the inmate has served one fourth of his sentence.

Rufus L. Edmisten, Attorney General
Jacob L. Safron
Special Deputy Attorney General

8 August 1975

Subject: Motor Vehicles; Registration; Transfer of Title

Requested by: Mr. E. B. Borden Parker
County Attorney
Wayne County

Question: May a title of a motor vehicle be transferred without the purchaser applying to the Department of Motor Vehicles for a new certificate of title?

Conclusion: Yes.

The 1963 amendment was a complete rewrite of G.S. 20-72(b). The decisions of *Insurance Company v. Insurance Company*, 276 NC 243, 172 SE 2d 55 (1970) and *Younts v. Insurance Company*, 281 NC 582, 189 SE 2d 137 (1972) involve the interpretation of the statute as it was before 1963. It was noted in both cases, however, that the 1963 amendment changed the requirements.

Specifically, the 1963 amendment deleted the requirement that application for certificate of title be made by the transferee before ownership to the vehicle passes. *Insurance Co. v. Hayes*, 276 NC 620, 174 SE 2d 511 (1970). No further amendments have affected this change. Thus, a title of a motor vehicle may pass without making an application to the Department of Motor Vehicles for a new certificate of title.

It should be noted that G.S. 20-73 still requires a new owner to secure a new certificate of title and that G.S. 20-74 provides a penalty for failure to do so. The 1963 amendment to G.S. 20-72(b) only affected the requirements for transfer of title and did not drop the requirement entirely.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

8 August 1975

Subject: Motor Vehicles; Equipment; Windshields and Windows; Use of One-way Visibility Glass

Requested by: Colonel E. W. Jones
Commander
State Highway Patrol

Question: May a substance be applied to the windshields and windows of motor vehicles so as to result in one-way vision; i.e., may be seen through from the inside out but not from the outside in?

Conclusion: No. Such a substance would be in violation of both G.S. 20-127(a) and G.S. 20-127(c). Subsection (a) prohibits all non-transparent material upon the windshield and the rear and side windows of any motor vehicle unless it is required by law or approved by the Commissioner of Motor Vehicles. In order for the material to be classified as transparent, it would have to be seen through from both sides of the glass. Subsection (c) also prohibits the use of such a substance. It requires the motor vehicle glass to be free from discoloration which would impair the driver's vision or create a hazard. The said substance, having the property of an ordinary mirror when a light inside the motor vehicle is turned on, can prevent the driver from seeing outside of his vehicle.

Under either of these subsections of G.S. 20-127, the substance which will allow only one-way visibility cannot be applied to the windshield or other windows of a motor vehicle unless, under subsection (a), it is approved by the Commissioner of Motor Vehicles.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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13 August 1975

Subject: Criminal Law; Applicability of
G.S. 14-269.2 to Private Security Guards
Employed by Institutions of Higher
Education and Secondary Schools

Requested by: Mr. Jerry Adams, Administrator
Private Protective Services
State Bureau of Investigation

Questions: (1) Does G.S. 14-269.2 prohibit private
security guards employed by the governing
board of an institution of higher education
from carrying weapons on the grounds of
the institution while acting in the
performance of their duties?

(2) Does G.S. 14-269.2 prohibit private
security guards employed by the board of
education of a secondary school system
from carrying weapons on the school
grounds while acting in the performance of
their duties?

Conclusions: (1) Private security guards employed by
an institution of higher education are
specifically exempt from the prohibition in
G.S. 14-269.2 against carrying weapons on
school grounds.

(2) Private security guards employed by
secondary schools are exempt from the
prohibition in G.S. 14-269.2 against
carrying weapons on school grounds if

commissioned as special policemen pursuant to Chapter 74A of the General Statutes.

Many institutions of higher education and some secondary schools employ private security guards to protect their buildings and grounds. These guards often carry weapons. The question has arisen as to whether such guards are prohibited by G.S. 14-269.2 from carrying weapons while carrying out their duties.

G.S. 14-269.2 provides, in pertinent part:

"It shall be unlawful for any person to possess, or carry, whether openly or concealed, any gun,...bowie knife,...blackjack,...or any other weapon of like kind,...in any public or private school building or bus, on any public or private school campus, grounds, recreation area, athletic field, or other property owned, used or operated by any board of education, school, college, or university board of trustees or directors for the administration of any public or private educational institution....This section shall not apply to the following persons: ...officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties,...and any private police employed by the administration or board of trustees of any public or private institution of higher education when acting in discharge of their duties."

The answer in regard to security guards employed by institutions of higher education is clear. Private security guards employed by an institution of higher education, while acting in the discharge of their duties, are specifically exempted by the terms of the statute from the prohibition against carrying a weapon onto the grounds.

A more difficult problem is presented in regard to security guards employed by secondary schools. The exemption in the statute for educational institutions is specifically limited to guards employed by an institution of higher education. There is no exemption found anywhere in the statute for guards employed by the board of

education of a secondary school system. Further, there is nothing in the language of the statute which would make it susceptible to an interpretation or construction permitting guards employed by the secondary schools to carry weapons. *Moore v. Jones*, 76 N.C. 187; *State v. Whitehurst*, 212 N.C. 300, 193 S.E. 657; 7 *Strong's N.C. Index 2d*, Statutes, Section 5. Thus, at first glance, it would appear that private security guards employed by the board of education of a secondary school system are prohibited from carrying any weapon on school grounds.

We, however, find it difficult to believe that such an inconsistency was intended by the General Assembly. In examining the General Statutes, we believe that this inconsistency is remedied by construing the exemption in G.S. 14-269.2 for "officers of the State or any county, city or town charged with the execution of the laws of the State" in conjunction with the provisions of Chapter 74A of the General Statutes. G.S. 74A-1 specifically provides that an "educational institution" may apply to the Governor for the commissioning of persons to act as policemen for it. G.S. 74A-2 defines the powers and duties of such policemen. Subsection (b) provides:

"Such policemen, while in the performance of the duties of their employment, shall severally possess all the powers of municipal and county police officers..."

It is the opinion of this Office that security guards employed by the board of education of a secondary school and commissioned by the Governor pursuant to the provisions of Chapter 74A would be "officers of the State,...charged with the execution of the laws of the State,..." within the meaning of G.S. 14-269.2 and, thus, exempt from the prohibitions of the statute.

To summarize, private security guards employed by an institution of higher education are exempt from the prohibitions of G.S. 14-269.2. Private security guards employed by the board of education of a secondary school system are exempt from the prohibition contained in that statute provided such security guards are commissioned by the Governor pursuant to Chapter 74A of the General Statutes. We must note, however, that a security guard employed by the board of education of a secondary school without

being commissioned pursuant to Chapter 74A and carrying a weapon on school grounds would appear to be in violation of G.S. 14-269.2.

Rufus L. Edmisten, Attorney General
Edwin M. Speas, Jr.
Special Deputy Attorney General

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15 August 1975

Subject: Social Services; Authority of Social Services Commission to Promulgate Standards for Selection of County Social Services Board Members; Constitutionality of Social Services Commission Standard Number 5

Requested by: Ms. Flora R. Garrett
Chairman
Orange County Board of Commissioners

Questions: (1) Under what statutory authority does the Social Services Commission adopt and enforce standards for selection of county social services board members?

(2) Does Standard Number 5 of the Social Services Commission, providing that, "(B)oard members shall not have any near relatives receiving financial assistance through the county department of social services on which board they serve..." run afoul of either the North Carolina or United States Constitution?

Conclusions: (1) The authority of the Social Services Commission to adopt and enforce standards for the selection of county social services board members is derived from G.S. 143B-153.

(2) Standard Number 5 of the Social Services Commission does not run afoul of either the North Carolina or the United States Constitution.

The authority of the Social Services Commission to promulgate standards for the selection of county social services board members is derived from its power and duty under G.S. 143B-153 "...to adopt rules and regulations to be followed in the conduct of the State's social service programs..." Since the county boards are entrusted with the responsibility of establishing county policies for the programs of public assistance established by Chapter 108 of the General Statutes (G.S. 108-7), it is the opinion of this Office that the Social Services Commission has legitimately exercised its power to determine who may set county policy in the administration of the *State's* social services programs.

However, it is patent that the standards for the selection of county social services board members may not violate provisions of either the State or federal constitution. It is suggested that Standard Number 5 of the Social Services Commission providing that "(B)oard members shall not have any near relatives receiving financial assistance through the county departments of social services on which board they serve. ('Near relatives are defined as father, mother, brother, sister, husband or wife, son, daughter, half brother and half sister.')" denies a segment of the county population of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and Section 19 of Article I of the Constitution of North Carolina. By now it is axiomatic that social and economic classificatory schemes must be rationally related to a valid State interest in order to avoid conflict with the Equal Protection Clause. *Reed v. Reed*, 404 U. S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971) citing *Royster Guano Co. v. Virginia*, 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989 (1920). The legitimate State objective in this case is not only the avoidance of conflict of interest but also the avoidance of impropriety, and also the appearance thereof, in the administration of the programs of public assistance in North Carolina. In the judgment of this Office, Standard Number 5 of the Social Services Commission furthers and is rationally connected to this valid State goal. We submit that the reasons advanced by the Supreme Court of the United States

in upholding the constitutionality of the Hatch Act, *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973), are analogous to the potential situation faced by employees of the county department of social services in attempting to handle the cases of recipients who are related to county board members:

"...the goal that employment and advancement in the government service not depend on political performance...that government employees be...free from pressure and from express or tacit invitation to vote in a certain way or to perform political chores in order to curry favor with their superiors rather than to act out their own beliefs."

Thus, while a board member with a near relative receiving public assistance might disqualify himself from reviewing his relative's public assistance file, he is powerless to eliminate the pervasive influence his presence on the board will have on caseworkers, eligibility specialists, and even fellow board members in dealing with that relative's case. Accordingly, we would contend that Standard Number 5 is constitutionally defensible under equal protection analysis.

Finally, this Office is of the opinion that Sections 7 and 8 of Article VI of the Constitution of North Carolina present no bar to the continued enforcement of Standard Number 5.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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19 August 1975

Subject: Public Contracts; Counties; Competitive
Bidding; Additional Work

Requested by: Mr. James R. Hood
County Attorney
Jones County

Question: May the Board of County Commissioners negotiate for the extension of a water distribution system estimated to cost one-half million dollars, with the contractor now performing work under a contract awarded pursuant to G.S. 143-129 for the installation of a county water distribution system?

Conclusion: No. G.S. 143-129 requires public contracts for construction and repair estimated to cost more than ten thousand dollars to be awarded to the lowest responsible bidder after public advertising. Such statute is regarded as rendering invalid and unenforceable subsequent agreements to pay one to whom a public contract has been duly awarded additional compensation for such extra work not included in the original contract.

In a letter of August 4, 1975, the Jones County Attorney advises that the Board of County Commissioners of Jones County has entered into a contract for the construction of distribution lines, treatment facilities, etc. for a county water system after advertising for bids in accordance with the provisions of G.S. 143-129. The county now finds that by reason of the bid being less than the engineer's estimate, that they have funds available for an additional extension of the county water system in the amount of \$550,000. The contractor awarded the initial contract has offered to construct the planned extension estimated to cost about \$550,000 at the contract unit price of the existing contract. The Commissioners are of the opinion that this price would be less than the cost if the contract were let after public advertising pursuant to G.S. 143-129. The Commissioners requested an opinion as to whether or not they can negotiate an extension of the water system with the initial contract or avoid public advertising for bids.

G.S. 143-129 requires contracts for the construction and repair estimated to cost more than \$10,000 to be awarded to the lowest responsible bidder after public advertising as provided in that section. A contract made in contravention of the statute is *ultra vires* and void. *Raynor v. Commissioners for Town of Louisburg*, 220 N. C. 348.

Statutes requiring the letting of public contracts to the lowest bidder are regarded as rendering invalid and unenforceable subsequent agreements to pay one to whom a public contract has been duly awarded additional compensation for extras or additional labor and materials not included in the original contract, at least where the additional compensation exceeds the amount for which the public contracts may be made without competitive bidding. Annotation: Public Contracts - Extras. 135 ALR 1266; *Teer v. State Highway Commission*, 4 N. C. App. 126, 133. Therefore, this Office is of the opinion that a contract for the extension of the county water system beyond that called for in the original contract awarded can only be entered into after competitive bidding in conformance with the provisions of G.S. 143-129.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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19 August 1975

Subject: Taxation; Franchise Taxes; Public Service Companies; Distributions of Tax to Municipalities; Sales Within a Municipality; G.S. 105-116

Requested by: Mr. John Hugh Williams
Attorney for City of Concord
Board of Light & Water Commissioners

Question: Where a power company delivers electricity to a city-owned substation located outside of the municipal limits of the city, which

the city in turn distributes through its distribution system to customers within the city, is the sale of electricity to the city a "sale within the municipality", so as to entitle it to a distribution of part of the franchise tax imposed and collected by the State?

Conclusion:

No.

G.S. 105-116 imposes a State franchise tax upon every electric utility company, measured by a percentage of its gross receipts. The Secretary of Revenue then ascertains "the total gross receipts derived from the *sale within any municipality* of the commodities or services described in this section, except water and sewerage services, and out of the tax of six percent (6%) of the gross receipts levied by this section, an amount equal to a tax of three percent (3%) of the gross receipts from *sales within any municipality* shall be distributed to such municipality..." (Emphasis supplied.)

The City of Concord owns and operates a system for the distribution of electricity. It purchases the electricity from Duke Power Company at wholesale for resale to customers within the City. Duke delivers the electricity to a city-owned substation from which further distribution is made by the City.

The substation is situated on a lot which, prior to 14 June 1973, was outside of, but contiguous to, the City limits. The substation itself was outside the City limits by about 150 feet. The electricity left the Duke Power Company distribution system and entered the City system at that point. On 14 June 1973, the City extended its limits to encompass the lot, together with other properties.

The question is, of course, whether Duke Power Company's gross receipts from the sale of electricity to the City of Concord before 14 June 1973 were "sales within the municipality" so that a portion of the tax paid by Duke and collected by the State would have been distributable by the State to the City of Concord. There is no question but that a portion of the tax on gross receipts after that date would be distributable, and has been so distributed. That question can be answered, we believe, by answering the following

question: Where did the sale of electricity to the City take place prior to 14 June 1973?

For the purposes of this inquiry, it is clear that electricity is property which itself may be the subject of sale.

"So far as the law is concerned, electricity made by artificial means or electric current is property capable of ownership and of sale and it may be the subject of larceny. With regard to the kind of property, electric current has been characterized as personal property or a commodity, and it has been said that the owner thereof may use it as he will, subject only to the lawful exercise of the police power." 26 Am. Jur. 2d *Electricity, Gas and Steam*, §1-

"A 'sale' consists in the passing of title from the seller to the buyer for a price." G.S. 25-2-106 See also G.S. 25-2-401.

It would appear that title to the electricity in question passes at the substation, which is the point at which Duke delivers it to the City and loses all its right to control its further distribution. At that point, it enters the City's system and is owned and controlled by it. Since the sale occurred at the substation, was the sale "within the municipality"?

The word "within" refers to an "area" and thus means "inside the limits of". *Towns of Indian Lake, et al v. State Board of Equalization and Review*, 45 Misc. 2d 463, 257 N. Y. S. 2d 301. *In re White's Estate*, 130 Kan. 714, 288 P. 764. *Majeski v. Stuyvesant Homes*, 140 N. J. Eq. 460, 55 A. 2d 33

See also *District of Columbia v. Chesapeake & Potomac Telephone Company*, 179 F. 2d 814, holding that the place where title passes is determinative of whether a sale has taken place "within the District of Columbia" so as to be subject to a gross receipts tax under a statute imposing such a tax on the sale of public utility commodities and services.

We conclude, therefore, that delivery of electricity to a substation physically located outside of and beyond the municipal limits of

the City of Concord does not constitute a "sale within the municipality" and that the City is not entitled to a distribution of a portion of a the gross receipts tax imposed pursuant to G.S. 105-116.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Special Deputy Attorney General

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20 August 1975

Subject: State Departments, Institutions and Agencies; North Carolina Board of Architecture; Payment of Expense Allowances to members of

Requested by: Mr. R. Mayne Albright
Attorney for the North Carolina
Board of Architecture

Question: May the Board approve and pay expense vouchers of its Board members under the provisions of its practice act, G.S. 83-10, or is the Board restricted to the expense allowance provision of G.S. 93B-5 as amended by Chapter 765 of the General Assembly of North Carolina, Session 1975?

Conclusion: The Board is restricted to the expense allowance provisions of G.S. 93B-5 as amended by Chapter 765 of the General Assembly of North Carolina, Session 1975.

G.S. 83-10 provides that all expenses incurred by members of the Board of Architecture necessary in the discharge of their duties be paid by the Treasurer of the Board upon warrant drawn by the Secretary and approved by the President from funds derived from examination fees. While this specific provision of Chapter 83 of the North Carolina General Statutes has not been changed, the General

Assembly has set out in Chapter 93B-5(b) as amended by Chapter 765 of the General Assembly of North Carolina, Session 1975, pertaining to Occupational Licensing Boards, that all Board members shall be reimbursed for all necessary travel expense, including room, meals and reasonable gratuities, in an amount not to exceed that authorized under G.S. 138-6(a)(3) which now provides TWENTY-THREE DOLLARS (\$23) per day while traveling in State and THIRTY-FIVE DOLLARS (\$35) per day while traveling out of State. Chapter 765 which amended G.S. 93B-5 further provided that:

"Sec. 3. All laws and clauses of laws in conflict with this Act are hereby repealed."

It is apparent from reading Section 3 as set out above that the intent of the General Assembly was to repeal the provisions of G.S. 83-10 which provides that all expenses incurred by members of the Board be reimbursed, and replaces it by Chapter 765. Board members shall be reimbursed as provided therein.

Rufus L. Edmisten, Attorney General
James E. Magner, Jr.
Assistant Attorney General

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20 August 1975

Subject: Municipalities; Redevelopment
Commission; Municipality Exercising
Powers of Redevelopment Commission;
G.S. 160A-505; Eminent Domain; Sale of
Property in Redevelopment Project

Requested by: Mr. Tommy W. Jarrett
Attorney-at-Law
Goldsboro

Questions: (1) Where a city has abolished a
redevelopment commission and exercises
the powers, duties and responsibilities of

the commission itself, pursuant to G.S. 160A-505, may the municipality exercise the power of eminent domain as conferred upon a redevelopment commission in G.S. 160A-515?

(2) Where the municipality has assumed the powers and duties of a redevelopment commission, do the provisions of G.S. 160A-514, concerning the disposition of property, apply or do the provisions of G.S. 160A-266 through 160A-275 apply?

Conclusions:

(1) The municipality is restricted to exercising the power of eminent domain as conferred by G.S. 160A-515 in carrying out the powers and duties of a redevelopment commission.

(2) G.S. 160-514 is controlling.

Pursuant to G.S. 160A-505, a city may abolish a redevelopment commission and undertake to exercise such powers, duties and responsibilities of the commission itself and it may assign the administration of redevelopment policies, programs and plans to any existing or new department of the municipality. When a municipality abolishes a redevelopment commission, it may, at any time subsequent to such abolishment or concurrently therewith, exercise the authority granted by G.S. 160A-505(a). A careful reading of G.S. 160A-505(a) indicates that the abolishment of the redevelopment commission and the assumption of powers, duties and responsibilities of the commission by the city confers upon the municipality, or any department of the municipality which it has assigned such powers, duties and responsibilities, the same authority contained in Article 22 of Chapter 160A, as previously was vested in the redevelopment commission.

We conclude, therefore, that in carrying out a redevelopment project, the city in acquiring property through eminent domain must use the procedures specified in G.S. 160A-515.

Although G.S. 160A-241 confers the power of eminent domain upon municipalities in addition to powers conferred by any other general law, charter or local act, the purposes for which the power of eminent domain may be exercised pursuant to G.S. 160A-241, are limited to the purposes listed therein, which do not include redevelopment projects.

Therefore, we conclude that the city, in carrying out a redevelopment project, should follow the procedures prescribed in G.S. 160A-515.

Likewise, we conclude that in the disposition of property of a redevelopment project, G.S. 160A-514 should be followed by the municipality, rather than the provisions for the disposition of property contained in G.S. 160A-266 through G.S. 160A-275.

Thus, we conclude that where a city itself is exercising the powers, duties and responsibilities of a redevelopment commission, it is restricted in carrying out a redevelopment program to those powers and procedures prescribed in Article 22 of Chapter 160 relating to redevelopment commissions.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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20 August 1975

Subject: Licenses and Licensing; House Movers
Licensing Board; Prorate License year and
License Fee; Indemnification Bond
Required by Chapter 366, 1975 Session
Laws (G.S. 136-44.32)

Requested by: Ms. Lana Brau
Secretary
House Movers Licensing Board

Questions: (1) What is the meaning and intent of
the term "indemnification bond" as used

in G.S. 136-44.32 which sets up the requirements to become a registered professional house mover?

(2) May the House Movers Licensing Board prorate the license year and license fee in such a manner so that all licenses become due on a date certain?

Conclusions:

(1) The meaning and intent of the term "indemnification bond" as used in G.S. 136-44.32 is to protect and secure citizens of the State of North Carolina against loss or damage that they might suffer, through no fault of their own, by the employment of a registered house mover to relocate an improvement from one point to another.

(2) No.

G.S. 136-44.32 provides, in part:

"No person shall engage in the business of moving houses on a State highway or road unless such person has obtained a license under the rules and regulations of the board and under the provisions of this Article. No person shall be licensed until he furnishes the board with proof that he has and will maintain personal injury liability insurance with limits of at least one hundred thousand dollars/three hundred thousand dollars (\$100,000/\$300,000); property damage insurance of at least fifty thousand dollars (\$50,000); and indemnification bond in a minimum amount of fifty thousand dollars (\$50,000)...."

In the interpretation and construction of statutes, the legislative intent must be determined. "Words in a statute are to be given their natural, ordinary meaning, unless the context requires a different construction." *Housing Authority v. Farabee*, 284 NC 242. In *Sellers v. Refrigerators, Inc.*, 283 NC 79, the Court said:

"Where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning..." (p. 85)

In 41 Am. Jur. 2d, Indemnity, §1, page 687, the term "indemnity" is defined as follows:

"The word 'indemnity' is defined by lexicographers to mean 'security or protection against hurt or loss or damage'. The word appears to be used in two general senses: (1) in the sense of giving security, which in many cases is done by the execution and delivery of a bond; and (2) in the sense of compensating for actual damage."

It may be stated, therefore, that the purpose of the indemnification bond required by the provisions of Chapter 366, 1975 Session Laws particularly G.S. 136-44.32, is to save harmless the customers of the licensed house mover against loss or damage they might suffer by reason of the employment of a licensed house mover in relocating an improvement. The loss for which the indemnity is provided under the statute is for the loss or damage to property being relocated by the licensed house mover, his agents, or employees. Such indemnification bond shall be secured for the benefit and use of aggrieved persons and executed by an authorized corporate surety or insurer approved by the Commissioner of Insurance in the total aggregate amount of FIFTY THOUSAND DOLLARS (\$50,000). The bond shall be continuous in form and shall be maintained and replaced annually at the time of renewal of the license. The bond shall be conditioned on the prompt payment of the losses hereinabove specified. Such bond shall remain in full force until the surety is released from liability by the House Movers Licensing Board. Without prejudice to any liability accruing prior to such cancellation however, the surety may cancel said bond upon 30 days advance notice in writing filed with the Board.

With respect to the authority of the Board to prorate the license year and license fee in such a manner as to have all licenses expire on a date certain, the statute is very specific. G.S. 136-44.32 provides in part:

"A license issued hereunder shall be effective for a period of one year from date of issuance. An annual license fee in the amount of one hundred dollars (\$100.00) shall be paid to the board...."

The statute specifically provides that the license issued by the Board shall be effective for a period of one year from date of issuance, G.S. 136-44.32, and makes no provisions for having either the license year or license fee prorated in such a manner as to have all licenses become due on a date certain.

Rufus L. Edmisten, Attorney General
James E. Magner, Jr.
Assistant Attorney General

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10 August 1975

Subject: Mental Health; Voluntary Admissions of
Minors and Incompetent Persons

Requested by: Mr. John L. Pinnix
Special Counsel
Broughton Hospital

Question: Do the post-admission procedures specified
by G.S. 122-56.7 violate the right to
privacy of a voluntarily admitted minor or
incompetent person?

Conclusion: No.

The policy of the State is to encourage voluntary admission to a treatment facility of any person believing himself to be in need of treatment for mental illness or inebriety. See G.S. 122-56.1 and G.S. 122-56.3.

G.S. 122-56.5 provides that a parent, person standing in *Loco parentis* or guardian shall act for a minor and a guardian or trustee shall act for a person adjudicated *non compos mentis* in applying for admission to a treatment facility.

In *In re Long*, 25 N.C. App. 702, _____ S.E. 2d _____ (1975) the Court stated:

"...we find the admission procedure used in the present case to be permissible. The judicial deference afforded to parental authority along with the parent's interest in being able to seek immediate treatment and the policy of encouraging voluntary admissions outweigh any interest the minor may have in pre-admission hearing.... However, the continued confinement of a minor based on that procedure requires procedural safeguards consistent with the Due Process Clause. Such procedural due process should be afforded at the earliest possible time after admission. We will not undertake to formulate a post-admission procedure designed to protect against the unnecessary confinement of a minor under Article 4 of Chapter 122. That is best left to the wisdom of the Legislature."

Chapter 839 of the 1975 Session Laws added a new section to Article 4 of Chapter 122 which is designated as G.S. 122-56.7 and entitled "Judicial determination." This section provides for a hearing specified by the Court of Appeals in *In re Long*, *supra*, and reads in pertinent part as follows:

"(a) A hearing shall be held in district court in the county in which the treatment facility is located within 10 days of the day a minor or a person adjudicated non compos mentis is admitted to a treatment facility pursuant to G.S. 122-56.5

(b) The court shall determine whether

- (1) such person is mentally ill or inebriate and
- (2) is in need of further treatment at the treatment facility."

This section further provides that the initial hearing and all subsequent proceedings shall be governed by the involuntary commitment procedures of Chapter 122, Article 5A, of the General Statutes.

he Court of Appeals in the *Long* case required a judicial determination satisfying procedural due process requirements for a minor or *non compos mentis* admitted by parent, guardian or trustee but left the formulation of such procedure for legislative action.

his Office is of the opinion the post-admission hearing specified by G.S. 122-56.7 does not violate any provision of the Federal Constitution, the Constitution of North Carolina, or the right of privacy of the patient.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

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1 August 1975

Subject: Mental Health; Facility Services; Licenses and Licensing; Requirement for Licensing of Local Mental Health Facilities Under G.S. 122-35.28

Requested by: Mr. I. O. Wilkerson, Jr.
Director
Division of Facility Services
N. C. Department of Human Resources

Questions: Does Article 2E of Chapter 122 require the licensing of:

(a) Mental health clinics operated under Article 2A, Chapter 122?

(b) Mental health clinics operated under Article 2C, Chapter 122 both single county operations and multiple county operations?

(c) Mental health clinics furnishing only inpatient treatment, only outpatient treatment, or both inpatient and outpatient treatment?

(d) Alcoholic rehabilitation agencies formed under Article 2B, Chapter 122?

(e) State operated institutions such as the four mental hospitals, the four centers for the mentally retarded, the three alcoholic rehabilitation centers, and the Wright School for emotionally disturbed children?

Conclusions: Article 2E of Chapter 122 does require the licensing of all of the types of facilities described in (a), (b), (c), and (d). It does not require the licensing of the facilities described in (e).

Article 2E of Chapter 122 is entitled "Licensing of local mental health facilities". It is a new statute enacted at the 1975 Session of the General Assembly with an effective date of July 1, 1975. The following statement found in G.S. 122-35.28, a section included within Article 2E, appears to set forth the basic intent of the legislators:

"Any local mental health facility, of whatsoever nature, which is operated under the provisions of Chapter 122 of the General Statutes is required to obtain a license permitting such operation...."

Clearly, the facilities operated in accordance with Articles 2A, 2B and 2C are local entities by their very statutory descriptions. Further, the sweeping language of G.S. 122-35.28 contemplates the inclusion of each and every one of these facilities regardless of the scope of or limitations on the services rendered by it.

As to the other facilities described in the question, the language in the following statutes clearly stamps them as State rather than local facilities:

The four mental hospitals-G.S. 122-7;
The four centers for the mentally
retarded-G.S. 122-69;

The three alcoholic centers-G.S. 122-7.1;
The Wright School for emotionally disturbed
children-G.S. 122-98.1.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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August 1975

Subject: State Departments, Institutions and
Agencies; Ports Authority; Power of the
Authority to Sell or Lease its Southport
Facility

Requested by: Mr. E. E. Lee, Jr.
Executive Director
State Ports Authority

Question: Does the State Ports Authority have the
power to sell or lease its small boat harbor
facility at Southport to a private individual
or enterprise?

Conclusion: The Ports Authority may lease its facility
at Southport to a private individual or
enterprise so long as such lease is consistent
with the purposes for which the Ports
Authority was established. It may not sell
its Southport facilities without specific
legislative authority.

In addition to its port facilities at Wilmington and Morehead City,
the North Carolina State Ports Authority owns and operates a small
boat harbor at Southport. This facility is situated on approximately
3 acres of land immediately adjacent to the inter-coastal waterway.
The harbor and a small office building were constructed with funds
received from a statewide bond referendum in 1959, Chapter 1038
of the 1959 Session Laws. A dry rack storage building was recently
constructed with Ports Authority funds. The Ports Authority is

exploring the possibility of selling or leasing this facility and, at its last meeting, requested an opinion from this Office concerning its power to proceed with such sale or lease.

G.S. 143-218(3) provides that the Ports Authority shall:

"Be authorized and empowered to rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of such property, real or personal, as said Authority may deem proper to carry out the purposes and provisions of this Article, all or any of them;..."

This statute has been interpreted as giving to the Ports Authority power to lease its property to private investors. *North Carolina State Ports Authority v. First Citizens Bank and Trust Co.*, 242 N.C. 416 88 S.E. 2d 1955; 41 N.C.A.G. 78. As noted in the referenced case and opinion, however, such a lease must be consistent with the purposes for which the Ports Authority was created. See also *Brumley v. Baxter*, 225 N.C. 691, 36 S.E. 2d 281. In this situation we believe this to mean that the Ports Authority may lease the small boat harbor to a private individual or investor for the operation of a public marina, but no other purpose.

The question of the power of the Ports Authority to sell any of its facilities has not heretofore been addressed by the courts or the Office. G.S. 143-218(3) does give to the Ports Authority general power to sell its real property. It is the opinion of this Office, however, that this general authority does not extend so far as to permit the Ports Authority to sell its entire facilities at Southport.

G.S. 143-217(1) specifically charges the Ports Authority with the improvement and development of the harbor facilities at Southport. The Ports Authority has undertaken this responsibility and public funds have been used to carry out such responsibility. We believe the harbor facilities at Southport have been dedicated to a public use. To sell this facility would constitute an abandonment of one of the purposes for which the Ports Authority was created and an abandonment of its dedication to public use. It is the opinion of this Office, that authority to sell the Southport facility may not be implied from the general powers of the Ports Authority. Such authority must be specifically granted that agency by the General Assembly.

n 56 *Am. Jur.*, Municipal Corporations, §550, the authority of municipal corporation to sell its property is described. There it is stated:

"...it is generally held that a municipal corporation has no implied power to sell real property which is held for a public use, and that such power cannot be implied from general charter or statutory authority to acquire, hold, or convey property. The principle is that all such property is held by the municipality in trust for the use and benefit of its citizens and is dedicated to the use of the public, and the corporation cannot divert itself of title without specific authority from the legislature."

This principle has consistently been applied in North Carolina. *Whishant v. Lumberton*, 254 N.C. 94, 118 S.E. 2d 35; *Harris v. Durham*, 185 N.C. 572, 117 S.E. 801. We believe it is generally applicable to public corporations such as the Ports Authority. *Wells v. Housing Corp.*, 213 N.C. 744, 197 S.E. 693.

Rufus L. Edmisten, Attorney General
Edwin M. Speas, Jr.
Special Deputy Attorney General

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August 1975

Subject: Taxation; Ad Valorem Taxes; Octennial Revaluation; Public Records; Property Record Cards; Work in Process of Completion by Contract Appraiser

Requested by: Mr. C. Frank Griffin
County Attorney
Union County

Question: Where property record cards are in the process of completion by a contract appraiser, and have not been delivered to

or accepted by the County in connection with its octennial revaluation of real property, are such cards "public records"?

Conclusion:

No.

Inquiry has been made as to whether an individual is entitled to have the County Tax Supervisor produce for inspection "real estate appraisal cards" as "public records" under the following circumstances:

Union County is in the process of performing the octennial revaluation of real property in the county for ad valorem tax purposes, the revaluation to be effective on 1 January 1976. Pursuant to G.S. 105-299, the County Commissioners employed and contracted with the Centralina Council of Governments to perform the reappraisal.

The contract is rather long and detailed, and provides in part as follows:

General Conditions, Paragraph E: Centralina "shall carry on the program of Revaluation without interruption and shall complete and deliver said work on or before September 1, 1975..."

Work To Be Performed, Paragraph A: "Centralina shall prepare and furnish the County with...an assessment manual and cost schedules..." Paragraph B: "Suitable record cards...shall be designed to meet the requirements of the County...which cards are to be furnished at the expense of Centralina." Further, "Centralina shall provide at its own expense all supplies, cards, and field record sheets needed in performing the work and all reports and manuals to be delivered to the County...Centralina shall, upon completion and acceptance of the work, deliver to the County Tax Supervisor all field notes, cards, and worksheets on all kinds and classes of properties valued in the appraisal..."

At this point in time, Centralina has done much work toward measurement and sketching of buildings, completing market surveys, etc., but this information has not been translated into values which have been applied to the property record cards. In addition, other raw data has been gathered concerning various parcels of land but no appraisals have been completed, with the possible exception of a few buildings in one or two townships. All of the work has been done by employees of Centralina, with some supervision by the Tax Supervisor.

Centralina's employees working on the project have, out of necessity and for convenience, been furnished with office space in the Courthouse. Those employees and some County employees share that space. Centralina, again out of necessity and as provided by the contract, has access to the office and files of the Tax Supervisor relative to the work being done by Centralina. To date, no work performed by Centralina has been accepted by the County, or delivered for acceptance, although much of the material, in various stages of completion, is physically located in space in the Courthouse assigned to the Tax Supervisor.

A newspaper reporter has now asked to see "the 1976 real estate appraisal cards", contending that they are public records, apparently for the purpose of preparing a newspaper account of the revaluation efforts of the county.

There is no question that public records, except as otherwise provided by law, ought to be accessible to the public. Public business is generally best performed when subject to public scrutiny, and the law so provides: "Every person having custody of public records shall permit them to be inspected..." G.S. 132-6. Nor can there be any question, we believe, that county tax records, including the county's property record cards, are such records and that the Tax Supervisor is ordinarily the person having custody of them and required to permit inspection of them.

However, it is our opinion that "inchoate" tax records in the process of preparation by one who has contracted with the county to provide such service do not constitute public records. "Public records" include "*documentary material*", regardless of physical form or characteristics, *made or received* pursuant to law or ordinance

in connection with the transaction of public business *by any agency of North Carolina government or its subdivisions.*" (Emphasis supplied.) G.S. 132-1. Here, according to the terms of the contract, the material sought has not been "made" by the Tax Supervisor or yet "received" by him.

Neither are these inchoate records public records in the hands of Centralina, which itself may be a unit of government, since they are not made by it "pursuant to law or ordinance" but rather pursuant to a contract to perform what is referred to in the contract and in the Centralina charter as a "special project". The contract itself is defined by statute as one "for personal services" (G.S. 105-299) and ordinarily the work product of one performing such a contract is his alone unless and until it is transmuted into such form as the contract itself may require to be delivered. We do not believe, for example, that a lawyer, employed to examine the title to county property, is required to open his title file on the property to the public simply because he has a contract to provide a personal service to the County, although his opinion of title, and indeed his file, would be open if furnished to the County and accepted by it pursuant to the contract.

Other jurisdictions have reached similar conclusions in connection with incomplete appraisals made by employed appraisers:

Linder v. Eckard, 261 Iowa 216, 152 N.W. 2d 833;
Curran v. Board of Park Commissioners, 22 Ohio Misc.
197, 51 Ohio Ops. 2d 321, 259 N.C. 2d 757.

We, therefore, conclude that the Tax Supervisor may not be required to open property record cards to public inspection until they are completed and delivered to the County in fulfillment of the contract and accepted by it. The entire appraisal process as well as its application to individual parcels of land is open to inspection, scrutiny and challenge under G.S. 105-317 and 105-322, after the records have become public. However, in all candor, we can see no harm in permitting the inspection of the incomplete records by a representative of the press unless to do so would delay or hinder the completion of the revaluation task.

Rufus L. Edmisten, Attorney General
Myron C. Banks
Special Deputy Attorney General

21 August 1975

Subject: Mental Health; Area Mental Health Programs, Single and Multi-County; Authority to Manage and Control Mental Health Program Funds

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
N. C. Department of Human Resources

Question: In both single and multi-county mental health programs, who has authority to manage and control mental health program funds?

Conclusion: In both single and multi-county mental health programs, the area mental health board has the authority to manage and control mental health program funds.

Area mental health programs are authorized by Article 2C of Chapter 122 of the General Statutes. G.S. 122-35.20 provides for the appointment of area mental health boards in both single and multiple counties and, subject to the rules and regulations of the State Commission for Mental Health Services, such board is responsible for evaluating the area needs and programs in the area of mental health and related fields. G.S. 122-35.19 defines "local funds" and "State grant-in-aid" with G.S. 122-35.23A providing a formula by which appropriations are made by the Department of Human Resources to the area mental health programs.

The nature of area mental health programs has been the subject of previous opinions by this Office. Those opinions conclude that area mental health centers under Article 2C of Chapter 122 of the General Statutes are under the authority and control of area mental health boards and not the county boards of commissioners, (Opinion of the Attorney General to Mr. Ervin M. Funderburk, Jr., 41 N.C.A.G. 778 (1972)), each area mental health program is administered by an area mental health board which constitutes an

entity created by the legislature with governmental functions, (Attorney General Opinion to Mr. R. Patterson Webb, 42 N.C.A.G. 120 (1972)), the area mental health board has authority to set the wages of employees of the area mental health program (Attorney General's Opinion to Mr. R. J. Bickel, 44 N.C.A.G. 67 (1975)), and that both single and multi-county programs are "public authorities" within the meaning of G.S. 159-7(b) (10). (Attorney General's Opinion to Mr. Harlan E. Boyles, 44 N.C.A.G. 185 (1975)). Additionally, Chapter 400 of the 1975 Session Laws amended G.S. 122-35.20(e) to read in pertinent part as follows:

"Area mental health boards are local political subdivisions created jointly by county or counties and the North Carolina Commission for Mental Health Services,..."

Based upon the foregoing, this Office is of the opinion that the area mental health board, a local political subdivision, has authority to manage and control mental health program funds. This should not be construed as inhibiting such boards from seeking the advice and assistance of the counties or other local subdivisions of government.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

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28 August 1975

Subject: Criminal Procedure; Chapter 15A
Non-testimonial Identification; Discovery
of Defendant's Remarks to Witnesses

Requested by: Mr. Anthony Brannon
District Attorney
Fourteenth Judicial District

Questions: (1) Does the requirement that the State
provide the defense with copies of

statements made by the defendant which the State intends to offer at trial (G.S. 15A-903(a)) extend to remarks made by the defendant to witnesses who have subsequently been interviewed by persons acting on behalf of the State?

(2) After an arrest of a defendant based upon probable cause, may law enforcement officers utilize normal investigative procedures such as photographing, fingerprinting, lineups, etc. or must the arresting officer proceed exclusively under the procedures for non-testimonial identification procedures set out in G.S. 15A-271 through G.S. 15A-282?

Conclusions:

(1) No, the requirement in G.S. 15A-903(a) that the State furnish to the defense copies of statements of the defendant which the State intends to offer at trial does not extend to remarks or conversation by the defendant to or in the presence of witnesses who are subsequently interviewed by persons acting on behalf of the State.

(2) No, after arrest of a defendant based upon probable cause, a law enforcement officer may utilize normal investigative procedures including fingerprinting, photographing, lineups, etc. and need not follow exclusively the Article 14 non-testimonial identification procedures.

The thrust of the requirement of G.S. 15A-903(a) is to require that counsel for a defendant knows of the existence and can thereafter inquire into the circumstances surrounding the taking of "statements" by the defendant to law enforcement officers. The statements sought to be disclosed are "admissions" and "confessions" by the defendant which might ordinarily be subject

to inquiry via a motion to suppress under Article 53.

The purpose of requiring such disclosure, in addition to the general policies favoring more complete discovery, is to facilitate the *pretrial* disposition of motions to suppress admissions and/or confessions made by the defendant in factual circumstances raising *Miranda*-related factual questions of improper inducement or coercion, deprivation of liberty, and voluntariness of confessions.

The remarks made to a bystander by a defendant in the process of committing a crime are not subject to the same policy considerations and the disclosure of that information would more logically fall under the provisions of G.S. 15A-904. There the Act exempts from mandatory discovery the statements of witnesses or prospective witnesses of the State to "anyone acting on behalf of the State".

This conclusion is further reinforced and supported by the exclusion from the Act by the General Assembly of the requirement (originally in the 1973 SB 207/HB 256) to disclose the names and addresses of witnesses. It would be illogical to assume that the Act intended to require discovery of remarks of the defendant to bystander witnesses but not disclosure of the witnesses' names. Yet the record is clear that the General Assembly in the Senate deleted from SB 207/HB 256 proposed Section 15A-903(f) and 15A-904(c) which would have required reciprocal disclosure of witnesses' names and addresses.

The question here was raised in the House and Senate committees with regard to *proposed* Section 15A-272 as it appeared in HB 256 and SB 207 in 1973. While the intent of the Criminal Code Commission was clearly *not* to require that the Article 14 procedure be required in normal law enforcement investigative procedures, the General Assembly wanted more explicit assurances and amended the bill to add what is now the second sentence of G.S. 15A-272. It reads:

"Nothing in this Article shall preclude such additional investigative procedures as are otherwise permitted by law."

The intent of the section (G.S. 15A-272) is clear on its face; but read in the context of its amendment by adding the second sentence, the legislative intent is undoubtedly to authorize non-testimonial identification procedures as an *additional* law enforcement investigative tool which could be utilized upon a showing of "reasonable grounds to suspect" the person named, a less stringent test than "probable cause to believe" that the person named had in fact committed the offense.

Rufus L. Edmisten, Attorney General
Sidney S. Eagles, Jr.
Special Deputy Attorney General

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8 September 1975

Subject: State Departments, Institutions and
Agencies; Public Officers, Deferred
Compensation Plan Board of Trustees;
Sovereign Immunity; G.S. 147-9.2 et seq.

Requested by: Mr. Glen B. Hardyman
Board of Trustees
North Carolina Public Employees Deferred
Compensation Plan

Questions: (1) Are Trustees of the North Carolina
Public Employees' Deferred Compensation
Plan public officers?

(2) Does the doctrine of sovereign
immunity apply to them?

Conclusions: (1) Yes.

(2) Yes, to the same extent as to other
public officers.

In 1971, the General Assembly adopted broad enabling legislation pursuant to which a State employee might defer income for income

tax purposes, a benefit which had not previously been available. C. 433, S.L. 1971; now codified as G.S. 147-9.2 et seq. Although the legislation has been in effect since ratification, on 24 May 1971, no income has been deferred under it, due undoubtedly to the many complexities involved in establishing any new tax-oriented benefit plan and to the very recent development of the deferred compensation field where public employees are concerned.

Observing the relative lack of activity in implementing the legislation, the Governor, in 1974, appointed a "Board of Trustees of the North Carolina Public Employees Deferred Compensation Plan", which, by Executive Order, was directed to establish a plan, secure its approval for federal income tax purposes and choose an administrator to assist in the establishment, maintenance and administration of the program. The Order further offers to each State agency the use of the Board in entering into deferred income contracts with employees.

Following many months of planning, meetings, and public hearings at which potential administrators and other interested persons and groups were heard, the Board has now adopted a plan, secured its approval by IRS, selected an administrator and is now prepared to offer a deferred compensation plan to State employees.

With that background in mind, and bearing in mind the creation of the Board by Executive Order and the potentially substantial funds which will be deferred and invested through the medium of the Board and its administrator, you have inquired whether, or to what extent, the Board will be entitled to the protection of the doctrine of sovereign immunity. The answer to that question appears to depend upon whether or not the Trustees are "public officers".

G.S. 147-9.4 provides that "*...the chief executive officer of an employee, on behalf of the employer, may enter into an annual contract with an employee under which the employee irrevocably elects to defer receipt of a portion of his following year's scheduled salary,...The agreement to defer income referred to herein shall be effective under the necessary regulations and procedures adopted by the chief executive officer and on forms prepared by him.*" (Emphasis supplied.)

By definition, an "employee" is a permanent, not temporary, State employee, the "employer" is the State of North Carolina and a "chief executive officer" is the administrative head of a State department or agency or "an agent of such chief executive officer duly authorized to enter into" deferred compensation contracts. G.S. 147-9.2.

The Governor is himself such a "chief executive officer", since he is the administrative head of "the Office of the Governor", having its own "immediate staff" of employees. G.S. 143A-12; G.S. 143A-10; G.S. 143B-5. He is clearly authorized, under G.S. 147-9.4, to adopt "necessary regulations and procedures", and may appoint an agent to represent him. G.S. 147-9.2(1). In this case, his agent is the Board of Trustees, which for deferred compensation purposes is by definition a "chief executive officer" (G.S. 147-9.2(1)), which acts "on behalf of the employer" (by definition, the State). G.S. 147-9.4. We, therefore, conclude that Trustees, who are appointed under the agency head's statutory power to adopt "necessary regulations and procedures", and whose function it is to act "on behalf of" the State under a statute which specifically recognizes the authority of an agency head to act through an "agent", must be and are public officers within the relatively narrow parameters of a deferred compensation plan.

Of course, the Governor has not merely created the Board (and the Board has not merely created the Plan) for the relatively few employees of the Governor's office. The Executive Order recognizes that by providing that other "chief executive officers" may also appoint the Board as their agents with respect to their departmental employees. There is no requirement in the law that they do so, but if they do, then Board becomes agent for *each* such department head, and again, as such agent, a Trustee would be a public officer.

With that in mind, the Trustees would be subject to the same immunity, and to the same liabilities, as other public officers generally. While any assertion of liability will depend upon the operative facts and circumstances, the following general statements which concern public officers, and which appear in 63 AM. Jur. 2d, *Public Officers and Employees*, § 288, are broadly applicable:

"§ 288. *Acts in line of duty or under color of authority.* As a rule, a public officer, whether judicial,

quasi-judicial, or executive is not personally liable to one injured in consequence of an act performed within the scope of his official authority, and in the line of his official duty. In order that acts may be done within the scope of official authority, it is not necessary that they be prescribed by statute, or even that they be specifically directed or requested by a superior officer, but it is sufficient if they are done by an officer in relation to matters committed by law to his control or supervision or that they have more or less connection with such matters, or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

The protection extends only to acts done in the line of official duty. Therefore, if an officer, even while acting under color of his office, exceeds the power conferred on him by law, he cannot shelter himself under the plea that he is a public agent. Neither an officer nor an agent can properly be said to have acted under color of a law which gave neither him nor any other person authority to do the act in question; nor can an officer be said to have acted under the authority of his office unless he has some appearance of right to it and is in possession and acting in that capacity, for the acts of a mere intruder or usurper of an office, without any colorable title, are undoubtedly void both as to individuals and as to the public."

Rufus L. Edmisten, Attorney General
Myron C. Banks,
Special Deputy Attorney General

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11 September 1975

Subject:

Armory Facilities; Use of City Funds for
Construction of Armory Facilities which
may be Located Outside the City Limits

Requested by: Mr. Lowry M. Betts
City Attorney
Sanford

Question: May a city appropriate and contribute city funds to be used in the construction of armory facilities for the North Carolina National Guard, which facilities will be located within the county but outside the city limits?

Conclusion: Yes.

G.S. 127-112 provides that any city or town in any county in the State may jointly or separately make appropriations to supplement available Federal or State funds to be used for the construction of armory facilities for the National Guard and that appropriations made under this authority shall be in amounts and in proportions as may be deemed adequate and necessary by the governing body of the county and/or municipality desiring to participate in the armory construction program.

G.S. 143-236 provides that every municipality and county is authorized and empowered to appropriate from year-to-year public funds for the benefit of any unit or units of the National Guard as the governing body of the municipality or county deems wise and expedient.

G.S. 143-235 provides that every municipality and county is authorized and empowered to acquire real property which may be suitable for use as an armory or for the construction of an armory thereon or for any other purpose of a unit or units of the National Guard. It further provides that contracting of an indebtedness and the expenditure of public funds for this purpose by any municipality or county will be a "necessary expense and for a public purpose."

The above cited authorities do not limit the expenditure of municipal funds to the construction of an armory facility or the maintenance of an armory facility to such facilities located within the city limits. They provide that the expenditure of moneys for such purposes may be made by a city or county "separately or

jointly" and that such expenditures will be considered a necessary expense and for a public purpose. The statutes are broad and expansive and do not restrict a city from appropriating and contributing city funds to be used for the construction of armory facilities for the North Carolina National Guard, even though those facilities may be located outside the municipal boundaries of the city.

Rufus L. Edmisten, Attorney General
John R. B. Matthis
Special Deputy Attorney General

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11 September 1975

Subject: Human Resources; Youth Services; Infants and Incompetents; Placement of Youths Over Sixteen Years of Age in Youth Services Facilities

Requested by: Mr. Edward F. Taylor
Assistant Administrator
Juvenile Services Division
Administrative Office of the Courts

Question: May a juvenile who has been placed on probation after reaching age sixteen be committed to the Department of Human Resources for placement in a facility administered by the Director of Youth Services because of a later violation of probation or other reason arising prior to his attaining the age of eighteen years?

Conclusion: No.

The current Chapter 134, effective July 1, 1975, establishes the rules for the administration of training schools by the Department of Human Resources, with the Director of Youth Services being the responsible official for that administration. As used in that Chapter,

the word "child" is defined as any person who has not reached his sixteenth birthday and "delinquent child" is defined as any child subject to juvenile jurisdiction in the district court "as defined by G.S. 7A-278(2) who is subject to commitment to an institution for delinquents under G.S. 7A-286." See G.S. 134-2(1) and (2). Further, G.S. 134-18 requires the Department of Human Resources to accept "...all children who have been committed for delinquency under G.S. 7A-286, provided the director or his staff finds that the statutory criteria specified in G.S. 7A-286(5) have been complied with."

Turning to G.S. 7A-278, the following provisions contain significant definitions:

"(1) 'Child' is any person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States: Provided that, for the purposes of subdivision (2) of this section, 'child' is any person who has not reached his sixteenth birthday."

"(2) 'Delinquent child' includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or a child who has violated conditions of his probation under this article."

Finally, G.S. 7A-286 provides for the commitment to a regional program of "a child who is delinquent."

Correlating all of the above statutory provisions, the conclusion is inevitable that the General Assembly intended that only children who have been adjudicated delinquent will be committed for placement in training schools, and that children, for that purpose, shall include only those adjudged to be delinquent prior to the age of sixteen.

It is noted, however, that the second paragraph of G.S. 7A-286 provides that when the court "...adjudicates the child to be delinquent...the jurisdiction of the court to modify any order of

disposition made in the case shall continue during the minority of the child or until terminated by order of the court, except as otherwise provided herein..." Thus, it would appear that when the adjudication of delinquency occurs before the child reaches the age of sixteen, modification of the court order to permit commitment to a Department of Human Resources Training School is authorized prior to the time the individual reaches the age of eighteen.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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24 September 1975

Subject: Mental Health; Area Mental Health Programs; Personnel Administration of Program Employees

Requested by: Mr. Edward B. Krause
Attorney for Area Board of Mental Health Area I-II
Buncombe, Madison, Yancey and Mitchell Counties

Question: As a result of the amendment of G.S. 122-35.20 by the 1975 General Assembly, are employees of Area Mental Health Programs now "county employees"?

Conclusion: Employees of Area Mental Health Programs are not "county employees" but Chapter 126, North Carolina General Statutes, is applicable to them for the purpose of personnel administration.

Article 2C, Chapter 122 creates Area Mental Health Programs. These Programs are under the control of Area Mental Health Boards, and this Office has repeatedly held such Boards to be governmental

entities separate from the State and the county governments.

The 1975 General Assembly amended G.S. 122-35.20 (a section within Article 2C) by adding the following language:

"Area Mental Health Boards are local political subdivisions created by county or counties and the North Carolina Commission for Mental Health Services, and employees thereof are local employees; however, for the purpose of personnel administration Chapter 126 shall be applicable."

Significantly, this Amendment, effective July 1, 1975, did not use the terminology "county employees" nor is there any indication of an intent to convert the program employees into employees of the county. However, the patent language of the Amendment requires adherence to Chapter 126 for "personnel administration". As a result of the language utilized by the General Assembly, it would appear that it was intended to make the language of Article 3 (entitled Local Discretion as to Local Government Employees) of Chapter 126 directly applicable to these programs.

In view of this statutory change, any conflict between it and the Opinion of the Attorney General to Mr. R. J. Bickel, dated 3 September 1974 (44 N.C.A.G. 67) must be resolved in favor of the later enacted statute.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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24 September 1975

Subject: Purchase and Contracts; Board of
Transportation; Contracts for Services of
Consultants

Requested by: Mr. Billy Rose
State Highway Administrator
N. C. Department of Transportation

Question:

Do the provisions of Chapter 887 of the 1975 Session Laws, entitled "An Act to Prohibit Employment of Consultants by State Agencies without approval of the Governor" apply to contracts entered into by the Board of Transportation with engineering firms for planning, design or construction of highways?

Conclusion:

No. The provisions of Chapter 887 applicable to "contracts for services of a consultant or advisory nature" do not include contracts for the planning, design and construction of highways which the Board of Transportation is authorized to enter into by the provisions of Chapter 136 of the General Statutes.

Chapter 887 of the 1975 Session Laws provides that "(b) No State agency shall contract to obtain services of a *consultant or advisory nature* unless the proposed contract has been justified to and approved in writing by the Governor..." (Emphasis supplied.) The Act provides that the Governor must find certain facts before approving the contract, including the necessity for it, that it cannot be performed by a State agency, that the estimated cost is reasonable, that the funds have been appropriated for such contract or they are otherwise available, and that the rules of the Division of Purchase and Contract have been complied with.

The only exclusions to the Act are provided for in Section 5 of the Act. Section 5 provides that "This act shall not apply to the General Assembly, Special Study Commission or the Institute of Government, nor shall it apply to attorneys employed by the North Carolina Department of Justice, or physicians or doctors performing contractual services for any State agency." The contracts inquired about do not come within the specific exclusions provided for in the Act.

The Act does not define the term nor specify what is included within the term "services of a consultant or advisory nature." It is the Opinion of this Office that contracts for "services of a consultant

or advisory nature" as the term is used in Chapter 887 of the 1975 Session Laws does not include those contracts authorized by the provisions of Chapter 136 to be entered into for planning, design, or construction of roads by the Board of Transportation. The Board of Transportation is authorized to perform such work or to let contracts for such work necessary to carry out the provisions of Chapter 136 of the General Statutes. *Equipment Company v. Hertz*, 256 N. C. 277. G.S. 136-28.1(f) provides that "contracts for professional engineering services" may be let by the Board of Transportation without taking and considering bids for proposals. There appears to be no intent by this Act of the Legislature to repeal or modify the authority already given to the Board of Transportation to perform such work or to let contracts for such work, as may be necessary to carry out the provisions of Chapter 136.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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24 September 1975

Subject: State Departments, Institutions and
Agencies; Mental Health; Patients; Consent
for Treatment

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services
N. C. Department of Human Resources

Question: Is a signed authorization required prior to
treating either an adult or minor patient
in a treatment facility?

Conclusion: A signed authorization is not required prior
to treating either an adult or a minor
patient in a treatment facility unless
specifically required by statute.

G.S. 122-36(g) defines a treatment facility as any hospital or institution operated by the State of North Carolina for the admission of any person in need of care and treatment due to mental illness or mental retardation and any center or facility operated by the State for the care, treatment or rehabilitation of inebriates and any community mental health clinic or center administered by the State of North Carolina.

G.S. 122-56.5 specifies that in consenting to medical treatment when consent is required a parent or person standing in *loco parentis* or guardian shall act for a minor and a trustee or guardian shall act for persons adjudicated *non compos mentis*. G.S. 122-58.6(c) authorizes a qualified physician attending respondent in an involuntary commitment proceeding to administer reasonable and appropriate medication and treatment consistent with accepted medical standards pending a hearing in the district court. G.S. 122-55.6 provides in pertinent part as follows:

"Treatment involving electroshock therapy, the use of experimental drugs or procedures, or surgery, other than emergency surgery, shall not be given without the express and informed *written* consent of the patient if competent, otherwise of the patient and guardian as hereinafter defined, unless the patient has been adjudicated an incompetent under Chapter 35 of the General Statutes and has not been restored to legal capacity, in which case express and informed written consent of his guardian or trustee appointed pursuant to Chapter 35 of the General Statutes must be obtained." (Emphasis supplied.)

Additionally, G.S. 122-55.5 provides that each patient shall have the right to treatment including medical care and habilitation regardless of age, degree of retardation or mental illness.

Where activities, other than medical treatment, are integral and accepted parts of a treatment program for a particular individual there would appear to be no legal requirement for execution of an authorization form prior to or as authorization for treatment of the patient; however, where treatment involves radical procedures such as electroshock therapy, the use of experimental drugs or

procedures, or surgery, informed written consent is required by or on behalf of the patient. By the express provision of G.S. 122-55.6 this does not apply to emergency surgery.

While the securing of written authorization is not essential unless required by statute, nevertheless with execution of proper consent forms later claims of misunderstanding, or legal action, regardless of its merit may well be avoided.

Therefore, obtaining execution of consent forms would be advisable although not required.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

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24 September 1975

Subject: Motor Vehicles; Limited Driving Permit
Pursuant to G.S. 20-138(b); (0.10 Blood Alcohol)

Requested by: Mr. Jerry C. Martin
Assistant Solicitor
17th District

Question: May a District Court Judge, or other trial judge, issue a limited driving privilege to a defendant who enters a plea of guilty to, or is convicted of, G.S. 20-138(b) when his master check discloses that he was, within the past ten years, convicted under subsection (a) of G.S. 20-138?

Conclusion: No.

G.S. 20-138 reads as follows:

"§20-138. *Persons under the influence of intoxicating liquor.*-(a) It is unlawful and punishable as provided

in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State."

"(b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight and upon conviction *if such conviction is a first conviction under this section*, he shall be eligible for consideration for limited driving privileges pursuant to the provisions of G.S. 20-179(b); provided that second and subsequent convictions under this section shall be punishable as provided in G.S. 20-179(a) (2) and (3). *An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence.*" (Emphasis supplied.)

The operation of any vehicle upon any highway or public vehicular area with a blood alcohol level of 0.10 or more is a lesser included offense of driving under the influence (G.S. 20-138(a)). Therefore, if a defendant has a prior conviction of driving under the influence within 10 years, a conviction of 0.10 could not be a first conviction under this statute.

It would appear, however, due to the wording of the proviso in subsection (b), that the period of suspension would be one year under G.S. 20-19(f) for a first conviction under subsection (b), as it is specified that a second and subsequent conviction shall be punishable as provided in G.S. 20-179(a) (2) and (3). We interpret this language to mean that a first conviction under G.S. 20-138(b) is not to be treated as cumulative under this section so as to give rise to the revocation provision of G.S. 20-19(d) and (e). We feel that this interpretation is bolstered by the fact that the word "section" is used when speaking to the issuance of a limited driving permit, while the word "subsection" is used in the proviso relative to punishment.

Rufus L. Edmisten, Attorney General
William W. Melvin, Special Deputy
Attorney General

24 September 1975

Subject: Prisoners and Prisons; Department of
Correction; Probation Investigation;
Presentence Diagnosis

Requested by: Mr. James P. Smith
Senior Administrative Assistant
Department of Correction

Question: Can a judge of the General Court of Justice
order that the Division of Adult Probation
and Parole of the North Carolina
Department of Correction obtain, pursuant
to G.S. 15-198, a presentence
psychological examination of a defendant
who has been convicted and is before the
court for sentencing when the necessary
resources for such examination are not
available to the Division of Adult Probation
and Parole.

Conclusion: No.

G.S. 15-198 provides, in pertinent part, that:

"When directed by the court the probation officer
shall fully investigate and report to the court in writing
the circumstances of the offense and the criminal
record, social history, and present condition of the
defendant, including, *whenever practicable, the
findings of a physical and mental examination of the
defendant....*" (Emphasis supplied.)

Furthermore, G.S. 148-12(b), applicable to presentence diagnostic
proceedings similarly provides, in pertinent part, that:

*"Within the limits of its capacity, and in accordance
with standards established by the Department, a
diagnostic center may, at the request of any sentencing
court, make a presentence diagnostic study of any*

person who has been convicted, is before the court for sentence, and is subject to commitment to the Department...." (Emphasis supplied.)

The phrase "whenever practicable", found in G.S. 15-198 clearly establishes that the Legislature did not intend to require presentence physical and mental examinations when the necessary specialized professional resources were not available to the probation officer charged with the preparation of the presentence report. Moreover, the language of G.S. 148-12, "Within the limits of its capacity, and in accordance with standards established by the Department, a diagnostic center may...", clearly establishes that the Department of Correction may restrict the preparation of presentence diagnostic studies "within the limits of its capacity, and in accordance with standards established by the Department...."

In this inquiry, we are advised that "As a result of 1975 General Assembly action, the Department of Correction lost its 'Self Improvement Centers' which provided professional presentence diagnosis. It is no longer practicable, from the Department of Correction viewpoint, to provide such presentence diagnosis." In view of the foregoing, and based upon the intent of G.S. 15-198 and 148-12(b), it is our opinion that if the Department of Correction lacks the resources and it is not "practicable" for a probation officer to obtain a psychological examination of the defendant, then, under these circumstances, the Court's order to provide a presentence psychological examination is not legally binding upon the probation officer and does not subject the probation officer, the Division of Adult Probation and Parole, or the Department of Correction to any liability due to failure to comply.

Rufus L. Edmisten, Attorney General
Jacob L. Safron
Special Deputy Attorney General

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30 September 1975

Subject: Youth Services; Human Resources; Term of
Office of Chairman of Commission of
Youth Services

Requested by: Mr. D. P. Dickey
Director of Planning
Division of Youth Services

Question: What is the duration of the appointment of the Chairman of the Commission of Youth Services?

Conclusion: The appointment of the Chairman of the Commission of Youth Services expires concurrently with the expiration of the incumbent's term of office as a member of the Commission.

G.S. 134-5 contains the following provision relative to this subject:

"The commission shall have a chairman who shall be appointed by the Governor from the members appointed by the Governor and who shall serve as chairman for his term."

Apparently, from this language some question has arisen as to whether the chairman's period of service runs through his own term or through the term of the Governor. The most realistic interpretation of this language would seem to regard it as referring to the Chairman's term of office as a member of the Commission.

This conclusion is solidified when the verbage of G.S. 134-4 is considered. That statute, in dealing with membership on the Commission, stipulates that the Governor shall appoint "*three members for two years* and two members for four years." (Emphasis supplied) Obviously the language regarding two year terms of office for three-fifths of the Governor's appointees would be incompatible with a provision authorizing one of these members to serve as Chairman for the entire term of the Governor.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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1 October 1975

Subject: Infants and Incompetents; Regional
Juvenile Detention Services; Setting of
State Standards

Requested by: Mr. David T. Flaherty
Secretary
Department of Human Resources

Question: Which Commission, Youth Services or
Social Services, has the authority to set
State standards for juvenile detention
services?

Conclusion: The Social Services Commission has the
authority to set State standards for juvenile
detention services, including regional
juvenile detention services. The Youth
Services Commission has the authority to
adopt rules and regulations implementing
State standards.

The 1975 Session of the General Assembly, in Chapter 742 of the 1975 Session Laws, created the Commission of Youth Services within the Department of Human Resources. (G.S. 134-3). This Commission is "to be responsible for administration of institutions for committed delinquent children and to work with other appropriate units of the department to develop and utilize community-based services for committed delinquents where appropriate and feasible." The actual question involved is whether this commission sets the State standards for juvenile detention services or if the Social Services Commission sets them. Article V of Chapter 742 deals with detention services. Section 134-36 under Article V states: "In addition to the authority of the Department under Part 3, Article 3, Chapter 108 and Article 10, Chapter 153A the department shall be responsible for the development and administration of regional detention homes as recommended in the report and for coordination of regional detention services through existing county detention homes." Does "development and administration" mean setting of standards? This language was taken from the previous statute, G.S. 134-35. This statute said:

"The General Assembly intends that the state-level responsibility for juvenile detention services shall be divided between two State agencies as follows: The Department of Human Resources shall continue to provide the services outlined in Part 3, Article 3, Chapter 108 and Article 10, Chapter 153A, in relation to juvenile detention homes, *including development of State standards*, ...The State Department of Correction shall be responsible for development and administration of the regional detention homes...." (Emphasis supplied)

Chapter 742 of the 1975 Session Laws did not change the authority of the Department of Human Resources and Social Services Commission to set State standards. It merely transferred the responsibility of the Department of Correction to the Commission of Youth Services under the Department of Human Resources.

The setting of State standards is provided by G.S. 153A-221.1. This section states:

"The legal responsibility of the Secretary of Human Resources and the Social Services Commission for State services to county juvenile detention homes under this Article is hereby confirmed and shall include the following: *development of State standards* under the prescribed procedures; inspection; consultation; technical assistance; and training. Further, the legal responsibility of the Department of Human Resources is hereby expanded to give said Department the *same legal responsibility as to the state-administered regional detention homes* which shall be developed by the State Department of Correction as provided by G.S. 134-37.

The Secretary of Human Resources shall develop *new standards* which shall be *applicable to county detention homes and regional detention homes* as defined by G.S. 134-36...." (Emphasis supplied)

Considering the prior law (G.S. 134-35) and the present (G.S. 153A-221.1, it is clear that the General Assembly intended

that the Secretary of the Department of Human Resources should develop Statewide standards for juvenile detention homes, including regional juvenile detention homes. These standards must be approved by the Social Services Commission.

Section 134-39 of Chapter 742 provides for the authority for implementation of this Act. This section says:

"In order to allow for effective implementation of a statewide regional approach to juvenile detention, the department shall have legal authority to do the following:

- (1) To develop rules and regulations which may be necessary to fulfill its responsibilities under this Article, which shall be effective when approved by the commission;
- (2) ...to pay State subsidies to counties providing regional juvenile detention services that meet *State standards*;
- (3) ...to demonstrate quality juvenile detention care on a regional basis that meet *State standards*;

* * *

- (6) ...to purchase detention care in a county detention home which meets *State standards....*" (Emphasis supplied)

Nowhere in Section 134-39 does this Act allow for the setting standards by the Commission of Youth Services. It is clear that the legislature did not intend to transfer this authority from the Social Services Commission. The Youth Services Commission has the authority to adopt rules and regulations for the implementation of the State standards which have been developed and adopted by the Social Services Commission; but they do not have the authority to adopt the standards themselves.

Rufus L. Edmisten, Attorney General
Isaac T. Avery, III
Associate Attorney

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October 1975

Subject: Prison and Prisoners; Parole Commission;
Work Release

Requested by: Mr. Jack Scism
Chairman
Parole Commission

Question: Under G.S. 148-33.1(a), is the Department of Correction authorized to place on Work Release, without Parole Commission approval, an inmate with an indeterminate sentence of five to ten years (or with any maximum sentence in excess of five years)?

Conclusion: No.

(S. 148-33.1(a) and (b) provide as follows:

"(a) Whenever a person is sentenced to imprisonment for a term not exceeding five years to be served in the State prison system, the Secretary of the Department of Correction may authorize the Director of Prisons to grant work-release privileges to any such inmate as may be eligible for the program as hereinafter established. The Department of Correction, upon recommendation of the presiding judge, shall immediately issue temporary work release privileges to any inmate so recommended upon verification of employment or at such time after commitment to the Department of Correction as employment can be obtained and verified.

"(b) The Parole Commission of the State may authorize the State Department of Correction to grant

work-release privileges to any inmate of the State prison system serving a term of greater than five years: Provided, that if the inmate thus being considered for work-release privileges has not yet served a fourth of his sentence if determinate or a fourth of his minimum sentence if indeterminate, the Parole Commission shall not authorize the Department of Correction to grant him work-release privileges without considering the recommendations of the presiding judge of the court which imposed the sentence."

The answer to this inquiry depends upon the nature of the indeterminate sentence. G.S. 148-42, as amended by Chapter 72 of the Session Laws of 1975, provides as follows:

"The several judges of the superior court are authorized in their discretion in sentencing prisoners to imprisonment to commit the prisoner to the custody of the Secretary of Correction for a minimum and maximum term. The maximum term imposed shall not exceed the limit otherwise prescribed by the law for the offense of which the person is convicted. At any time after the prisoner has served a minimum term less earned allowances for good behavior, pursuant to G.S. 143B-266(b), the Parole Commission is authorized to unconditionally discharge such person."

Thus, it is apparent that a prisoner committed to an indeterminate sentence only possesses an expectancy of release by the Parole Commission upon service of "the minimum term less earned allowances for good behavior..." The prisoner is liable for the service of the maximum sentence, less earned allowances for good behavior. Although there is no North Carolina caselaw speaking directly on the subject, the Supreme Court of North Carolina in *Goble v. Bouds*, 281 N.C. 307 (1972) cites with approval the language in *Menechino v. Oswald*, 430 F. 2d 403, stating that "...He (the prisoner) is entitled only to be released after full service of his sentence less good time earned during incarceration. The Board (Parole Board) is given absolute and exclusive discretion to decide whether or not to initiate parole proceedings and if so, whether parole should be granted to him. Appellant has been constitutional

deprived of his right to liberty for the period of his sentence...."

Upon analysis of the foregoing, it is the opinion of this Office that the provisions of G.S. 148-33.1(a) authorizing the Department of Correction to grant work release privileges to any inmate "sentenced to imprisonment for a term not exceeding five years" without the authorization of the Parole Commission, is applicable only to those inmates who are sentenced to a determinate sentence not exceeding five years or to an indeterminate sentence, the maximum term of which does not exceed five years. If the maximum sentence exceeds five years, then the requirements of G.S. 148-33.1(b) are applicable and the authorization of the Parole Commission is required.

Rufus L. Edmisten, Attorney General
Jacob L. Safron
Special Deputy Attorney General

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October 1975

Subject: Juveniles; Criminal Law and Procedure;
Juvenile Detention; G.S. 7A-280;
G.S. 110-24; G.S. 153A-221.1 as amended
by Chapter 426 of the 1975 Session Laws;
Chapter 742 of the 1975 Session Laws
("Youth Services")

Requested by: Honorable J. B. Allen, Jr.
Chief District Court Judge
15th Judicial District

Question: May a juvenile 14 years of age or older who
is alleged to have committed an offense
which constitutes a felony and whose case
has been transferred by a district court
judge, after a probable cause hearing, to the
superior court division for trial as in the
case of adults, pursuant to G.S. 7A-280,
be detained in a separate section of a local
jail for more than five calendar days?

Conclusion:

Construing the provisions of G.S. 7A-280, G.S. 110-24, G.S. 153A-221.1, and §134-2(13) of ratified Chapter 742 of the 1975 Session Laws together, it is the conclusion of this Office that a juvenile 14 years of age or older who is alleged to have committed an offense which constitutes a felony and whose case has been transferred by a district court judge, after a probable cause hearing, to the superior court division for trial as in the case of adults may not be detained in a separate section of a local jail for more than five calendar days.

G.S. 7A-280 provides, in essence, that a district court judge shall conduct a probable cause hearing in the case of a child who has reached his fourteenth birthday and who is alleged to have committed an offense which constitutes a felony. If the judge determines probable cause, he may proceed to hear the case himself or he "may transfer the case to the superior court division for trial as in the case of adults." However, "(I)f the alleged felony constitutes a capital offense and the judge finds probable cause, the judge shall transfer the case to the superior court division for trial as in the case of adults."

In the case of such a transfer, the judge is vested with the authority to order "that the child be detained in a juvenile detention home or separate section of a local jail as provided by G.S. 110-2 pending trial in the superior court division." G.S. 7A-280.

G.S. 110-24, which sets forth the requirements for lawful juvenile detention, provides, *inter alia*:

"It shall be unlawful for any child coming within the provisions of Article 23 of Chapter 7A to be placed in any jail, prison or other penal institution where such child will come into contact with adults charged with or convicted of crimes, *except that a court may detain a child in a jail with a holdover facility for juveniles approved by the Department of Human Resources as meeting the State standards as provided by Part 3*

Article 3, Chapter 108 and Article 10, Chapter 153A."
(Emphasis supplied)

The Secretary of Human Resources is mandated by S. 153A-221.1, as amended by Chapter 426 of the 1975 Session Laws, to "develop standards under which a local jail may be approved as a holdover facility *for not more than five calendar days ending placement in a juvenile detention home* which meets State standards, providing the local jail is so arranged that any child placed in the holdover facility cannot converse with, see, or be seen by the adult population of the jail while in the holdover facility...." (Emphasis supplied)

S. 134-2(13) of ratified Chapter 742 of the 1975 Session Laws ("Youth Services"), effective July 1, 1975, defines "holdover facility" as "a place in a local jail approved by the Department of Human Resources for detention of a child *for not more than five calendar days prior to placement in an approved detention home.*" (Emphasis supplied)

A fair reading of the foregoing statutes indicates that a district court judge transferring the case of a juvenile offender to superior court may detain the youth only in a jail with a holdover facility for juveniles approved by the Department of Human Resources and only for a period of five calendar days prior to placement in an approved detention home. The probable rationale for these conditions on juvenile detention is gleaned from an examination of the enunciated state policy applicable to youthful offenders. For example, S. 7A-277 ("Jurisdiction and Procedure Applicable to Children") provides in pertinent part:

"The purpose of this Article is to provide procedures and resources for children within the juvenile jurisdiction of the district court *which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults.* These procedures are intended to provide a simple judicial process to provide such *protection*, treatment, rehabilitation or correction as may be appropriate in relation to the needs of each child subject to juvenile jurisdiction and the best interests of the State...." (Emphasis supplied)

Further manifestation of this State policy towards juvenile offenders is contained in §134-23 of Article III of Chapter 742 which sets forth:

"In the case of any youth whose case was transferred from the district court division to the superior court division for trial as an adult as provided by G.S. 7A-280 and who was convicted of a felony and committed to the Department of Correction, all citizenship rights forfeited as a result of such conviction shall be automatically restored to such youth upon the youth's final discharge under rules and regulations of the Department of Correction, and the Secretary of Correction is authorized to issue a certificate to this effect."

Since all these statutory provisions are *in pari materia*, they must be construed together. That construction by this Office is that a juvenile whose case has been transferred to the superior court division for trial as in the case of an adult may only be detained in a jail with a holdover facility for juveniles, approved by the Department of Human Resources, for five calendar days prior to placement in an approved detention home.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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2 October 1975

Subject: State Departments, Institutions and
Agencies; Ports Authority; Power of the
Authority to Lease its Southport Facility
Power of the Authority to Sell Gasoline
and Diesel Fuel at its Southport Facility
Government in Business

Requested by: Mr. E. E. Lee, Jr.
Acting Executive Director
State Ports Authority

Questions:

(1) Does G.S. 66-58 prohibit the Ports Authority from selling gasoline and diesel fuel to boat operators using the Southport Boat Harbor?

(2) If the Ports Authority decides to lease its Southport facility to a private individual or enterprise, must it publicly advertise for bids as provided in G.S. 66-58(b)(14)?

Conclusions:

(1) No. The Ports Authority has specific statutory authority to operate its Southport facility. This grant of authority includes the right to do all things essential to the proper operation of such a facility. The sale of gasoline and diesel fuel to boat operators is an integral part of the successful operation of a small boat harbor or marina.

(2) No. The provisions of Article 11, Chapter 66, of the General Statutes are not applicable to the Authority's operations at Southport.

Recently this Office issued an opinion to Mr. E. E. Lee, Jr., Acting Executive Director, State Ports Authority, holding that the Ports Authority may lease its facility at Southport to a private individual or enterprise as long as such lease is consistent with the purposes for which the Authority was established. Since that time, several questions have arisen concerning the present operation of this facility by the Authority and the procedure which should be followed in the event the Authority decides to lease the facility to a private individual or enterprise.

As a part of its operation of the Southport facility, the Authority sells gasoline and diesel fuel to boat operators. The question arises as to whether such activity constitutes competition with private enterprise in violation of G.S. 66-58. G.S. 66-58(a) provides, in part, it shall be unlawful for any unit, department or agency of

State government to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprise.

G.S. 143-217(1) specifically charges the Authority with the duty of improving and developing the harbor facilities at Southport. G.S. 143-218(13) authorizes the Authority to do any and all things necessary to accomplish the purposes for which it was created. G.S. 143-228 provides that the provisions of the Article creating the Authority shall be liberally construed. Where a strict construction would result in the defeat of the accomplishment of any of the acts authorized herein, and a liberal construction would permit or assist in the accomplishment thereof, the liberal construction shall be chosen. G.S. 143-228.

The services and facilities offered to the public at the Southport Boat Harbor are those normally provided to the public at many privately-owned small boat harbors or marinas found on our coast. Thus, it is clear that the entire operation at the Southport facility places the Authority in a position of direct competition with those segments of our private economy which normally provide the services offered at such facilities. It is equally clear that the Legislature has specifically authorized and directed the Authority to provide these services to the public at its Southport facility.

The sale of gasoline and diesel fuel to boat operators is an integral part of the successful operation of a small boat harbor or marina. Therefore, we are of the opinion that the Authority can legally continue to provide this service to the public at the Southport facility.

A question has also arisen concerning the proper procedure to be followed in the event the Authority decides to lease the Southport facility to a private individual or enterprise. Specifically, the question is whether the Authority must comply with the competitive bidding requirements of G.S. 66-58(b)(14), since such a lease arrangement could be interpreted as indirect competition by the Authority with private enterprise.

We are of the opinion that the Authority is not required to comply with the provisions of G.S. 66-58(b)(14) in negotiating such a lease. To hold otherwise would require a finding that the provisions of G.S. 66-58(a) are applicable to the Authority when it does indirectly what we have concluded it has the statutory authority to do directly.

Rufus L. Edmisten, Attorney General
Roy A. Giles, Jr.
Assistant Attorney General

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October 1975

Subject: Counties; Sale of Real Property; G.S. 153A-176, G.S. 160A-266

Requested by: Mr. Robert C. Hunter
County Attorney
McDowell County

Question: May a county sell real property by private negotiation and sale when the property is valued at less than \$5,000?

Conclusion: Yes.

G.S. 153A-176 authorizes a county to dispose of any real or personal property belonging to it according to the procedures prescribed in Chapter 160A, Article 12.

G.S. 160A-266 authorizes a city and a county to dispose of real or personal property by private negotiation and sale; advertisement or seal bids; negotiation offer, advertisement, and upset bids; public auction or exchange, subject to the limitations prescribed in subsection (b) of G.S. 160A-266.

Subsection (b) states that private negotiation and sale may be used only with respect to personal property valued at less than \$5,000 or any one item or group of similar items. Real property and personal property valued at \$5,000 or more for any one item or group of similar items may be sold by any method permitted by

the Article, other than private negotiation and sale, or may be exchanged as permitted by G.S. 160A-271.

If the second sentence in subsection (b) did not place the \$5,000 or more value upon real property and personal property which may be sold by any method permitted by the Article other than private negotiation and sale, then it would be clear that real property, as well as personal property, cannot be disposed of by private negotiation and sale. However, the statute is completely silent as to any limitation upon the disposition of real property valued at less than \$5,000.

Therefore, we conclude that real property valued at less than \$5,000 may be disposed of by any of the five methods set forth in G.S. 160A-266(a).

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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7 October 1975

Subject: State Bureau of Investigation; Distribution
of S.B.I. Bulletin; Publications; Public
Record, G.S. 147-50, 132-1, 114-15

Requested by: Mr. Charles Dunn, Director
State Bureau of Investigation
Department of Justice

Question: Does G.S. 147-50, which requires free
distribution of any publications of other
State agencies on request, include the
distribution of the S.B.I. Investigative
"Bulletin"?

Conclusion: No. G.S. 147-50 does not require the
distribution of the S.B.I. Investigative
"Bulletin" because information contained
in it is not of public record, but instead
is information used by law enforcement

officers to collect and compile evidence for the trial of cases.

The statutes in question are G.S. 147-50, 132-1, 114-15. The pertinent parts of these statutes are set below:

"§147-50. *Publications of State officials and department heads furnished to certain institutions, agencies, etc.* -Every State official and every head of a State department, institution or agency issuing any printed report, bulletin, map or other publication, shall, on request, furnish copies of such reports, bulletins, maps or other publications to the following institutions in the number set out below:...."

"§132-1. *Public records defined.*-Public records comprise all written or printed books, papers, letters, documents and maps made and received in pursuance of law by the public offices of the State and its counties, municipalities and other subdivisions of government in the transaction of public business."

"§114-15. *Investigations of lynchings, election frauds, etc.; services subject to call of Governor; witness fees and mileage for Director and assistants.*-

* * *

All records and evidence collected and compiled by the Director of the Bureau and his assistants shall not be considered public records within the meaning of G.S. 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction. Provided that all records and evidence collected and compiled by the Director of the Bureau and his assistants shall, upon request, be made available to the district attorney of any district if the same concerns persons or investigations in his district...."

General Statute 147-50 is clear and unambiguous in its mandate to those State agencies who issue publications that they "...shall

on request, furnish..." to the enumerated institutions the numbers specified of "...reports, bulletins, maps or other publications...." However, it is the opinion of this Office that the philosophy behind this statute is one of economics. The legislative intent was to enable the various libraries of the State to receive free copies of any State publications rather than compelling the libraries to allocate their limited resources for the purchase of such State documents and publications which contain information of public knowledge and record. (See 42 N.C.A.G. 94.) On the contrary, however, it was not the intent of the General Assembly to require the distribution (free or otherwise) of information which is not of public record, but instead, is used by various agencies in the field of law enforcement for the purpose of gathering evidence to be used in the trial of criminal cases.

The information contained in the S.B.I. "Bulletin" pertains to suspects of crimes, their whereabouts, activities, previous criminal involvement and any other material which would help law enforcement agencies to fight crime. Such information is not of public record. It is used by State and municipal law enforcement agencies in on-going criminal investigations which by their nature must be carried on in secret in order to insure the safety of the individual law enforcement officers involved in the investigations. The valid law enforcement interest protected by exempting the State Bureau of Investigation "Bulletin" from public dissemination more than outweighs the small economic savings of having copies of the "Bulletin" distributed to State libraries free of charge or otherwise.

The S.B.I. "Bulletin" is considered an internal memorandum in that the distribution of the pamphlet is limited to law enforcement agencies. Copies are sent to the Federal Bureau of Investigation, State Highway Patrol, State Bureau of Investigation agents, and local police and sheriffs' departments. The Directors of Security at the large college campuses within this State also receive copies.

The purpose of the "Bulletin" is to assist law enforcement agencies and give them an opportunity to stay organized through close contact and communication. The close contact and communication afforded by the S.B.I. "Bulletin" better enables the law enforcement agencies to not only apprehend criminals but also often assists them in preventing a continuation of their criminal acts. To disseminate

this "Bulletin" could threaten security and compromise confidential sources of information.

It was stated in an Attorney General opinion that:

"If a State agency issuing publications desires to be exempt from this requirement as to one or all of its publications, it should seek from the General Assembly an express exclusion for all or certain of its '...reports, bulletins, maps, and other publications...' from the purview of G.S. 147-50."

It is our opinion that there exists such an express statutory exclusion for the S.B.I.'s publications of this type. G.S. 114-15 specifically excludes "all records and evidence collected and compiled by the Director of the Bureau (of Investigation) and his assistants...." While it does not specifically refer to the S.B.I. "Bulletin", it is clear that *any* record or evidence compiled by the Director of the Bureau or his assistants which is used in the *investigation* of criminal cases is not to be considered a public record within the meaning of G.S. 132-1 which defines "Public records". However, it should be noted that police arrest and disposition records are subject to public examination. (See 41 N.C.A.G. 407 (1971).)

G.S. 132-1 defines "Public records" as any written or printed books, papers, etc. made in pursuance of law and in the transaction of public business. Certainly, the S.B.I. "Bulletin" could be considered a public record within the meaning of the definition. However, G.S. 114-15 exempts it because each issue of the "Bulletin" contains part of the investigative files of on-going criminal investigations. Therefore, G.S. 147-50 would not apply to the S.B.I. "Bulletin" and distribution to the various State libraries would not be required.

Rufus L. Edmisten, Attorney General
T. Lawrence Pollard
Associate Attorney

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7 October 1975

Subject: Mental Health; Involuntary Commitment;
Police Officers; Authority of City Police

Officer to Transport a Mental Patient
Outside of the City

Requested by: Mr. W. B. Trevorrow
County Attorney
Guilford County

- Questions:
- (1) Do the provisions of G.S. 122-58.14 require a city to provide the necessary transportation for a mental patient being taken to a community mental health facility outside of the city limits?
 - (2) Is a member of the police force of a city authorized to take a mental patient, being processed for involuntary commitment to a community mental health facility located outside of the city limits but within the bounds of the county wherein the city is located?

- Conclusions:
- (1) G.S. 122-58.14 requires a city to provide the transportation necessary to take a resident of the city who is being processed for involuntary commitment to a community mental health facility which is located outside of the city but inside of the same county.
 - (2) Yes.

G.S. 122-58.14(a), *inter alia*, provides as follows:

"Transportation of a respondent to or from a clerk or magistrate, a qualified physician, a community mental health facility, and a hearing shall be provided by the city or county,...If the respondent is a resident of a city, the city has the duty to provide the transportation;...Transportation to or from a regional hospital outside the county, for any purpose, is the responsibility of the county..."

G.S. 122-58.4(a) requires a law enforcement officer to "take" a respondent to a community mental health center for examination when required and vests him with the authority to detain the respondent in a community mental health facility where necessary. For the purpose of involuntary commitment, the term "law-enforcement officer" is defined as a "sheriff, deputy sheriff, police officer, and State highway patrolman." See G.S. 122-58.2(3).

Reading all of these statutory provisions together compels the conclusion that the General Assembly intended that any transportation of such a respondent (who, if he is a proper subject for involuntary commitment, is imminently dangerous to himself or others) would be under escort of a law enforcement officer. In view of the provisions of G.S. 122-58.14(a), the conclusion is inescapable that the General Assembly intended to authorize a "police officer" who is a member of a city police department to function as such escort to a facility which is within the boundaries of the county though outside the city limits.

It would seem that some question has arisen relative to the provisions of G.S. 160A-286 that:

"In addition to their authority within the corporate limits, city policemen shall have all the powers invested in law-enforcement officers by statute or common law within one mile of the corporate limits of the city, and on all property owned by or leased to the city wherever located."

Thus, the argument has devolved that city police officers are precluded under any circumstances from having any authority outside of one mile of the corporate limits of the city. The language of G.S. 160A-286 was clearly intended to automatically *extend* the authority of a city police officer in situations where there might be some doubt as to such authority. See opinion of the Attorney General to the Honorable Henry W. Hight, 41 N.C.A.G. 929 (1972). It would require a strained construction of this statute to regard it as circumscribing the authority specifically vested in a police officer by another General Statute. G.S. 160A-286 should not be regarded as having such a limiting effect upon the provisions of Chapter 122.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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14 October 1975

Subject: Health; Public Officers; Civil Liability;
Sanitarians; Nurses

Requested by: Mr. R. L. Brown, Jr.
County Attorney
Stanley County

Questions: (1) Are sanitarians and nurses in local
health departments public officers?
(2) What, if any immunity from civil
liability do sanitarians and nurses possess?

Conclusion: Sanitarians and nurses are employees of
local health departments and may be civilly
liable for the consequences of their
negligence.

"A public office is an agency for the State, and the person whose
duty it is to perform this agency is a public officer." *Clark v. Stanley*,
66 NC 60, 8 AR 488 (1872). A description of the nature of a public
office is contained in the following opinions of our Supreme Court:

"An office...is a public position to which a portion
of the sovereignty of the country, either legislative,
executive or judicial, attaches for the time being, and
which is exercised for the benefit of the public." *Doyle*
v. Raleigh, 89 NC 133, 136, 45 AR 677 (1883)

"The true test of a public office seems to be that it
is parcel of the administration of government, civil or
military, or is itself created by the law-making power."
Eliason v. Coleman, 86 NC 236, 240-241 (1882)

"The essence of it is the duty of performing an agency, that is, of doing some act or acts or series of acts for the State." *Clark v. Stanley, supra*, at 63

"To constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question." *State v. Hord*, 264 NC 149, 155, 141 SE 2d 241 (1965)

A public office is, therefore, a position (1) to which a portion of state sovereignty attaches and (2) which is created by the constitution or statute or an inferior body to which the authority to create a public office has been delegated.

A nurse retained by a local health department is charged with attending to the health needs of the patients of the local health department. The practice of nursing, regulated by the State under the *Nurse Practice Act* (Article 9 of Chapter 90 of the General Statutes), is essential to the welfare of the people of this State. However, it is clear that the practice of nursing for a local health department does not encompass the exercise of a portion of the sovereignty of the State.

A sanitarian retained by a local health department is charged with, among other responsibilities, inspecting and investigating establishments regulated by health laws, rules and regulations. (See Article 13A of Chapter 130, Article 7 of Chapter 110, Article 15 of Chapter 130, Part 2, Article 10 of Chapter 153A, Article 5 of Chapter 72, Article 28 of Chapter 130 and Article 14 of Chapter 130.) A permit is issued by the sanitarian upon ascertainment of compliance with the applicable health law, rule or regulation.

G.S. 130-11 provides that: "The administrative staff of the Department of Human Resources shall...enforce the State health laws and the rules and regulations..." and "...make sanitary and health investigations and inspections." G.S. 143B-10 provides that the Secretary "...may assign or reassign any functions vested in him or

in his department." G.S. 130-10 provides that "The local health director shall be the administrative head of the local health department...."

The foregoing statutes reveal a framework by which the authority for enforcing health laws, rules and regulations is conferred upon the Secretary of Human Resources and local health directors. The Secretary is the head of the Department of Human Resources and local health directors are the administrative heads of local health departments. Each may assign functions to employees within his department. A local health department sanitarian performs functions assigned to him by the local health director and other functions authorized by the Secretary of Human Resources. A local health department sanitarian does not hold a position created by the constitution or statute or an inferior body to which the authority to create a public office has been delegated, but rather he is the agent of the local health director and Secretary of Human Resources.

A local health department nurse and sanitarian are employees of the local health department. As employees, they may be civilly liable for the consequences of their negligence. An opinion of this Office, dated 16 April 1975, to Mr. Richard J. Bickel, 44 N.C.A.G. 299, addresses the question of personal liability of members of a medical team for negligence in the operation or treatment of a patient.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Associate Attorney

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14 October 1975

Subject: Municipalities; Authority of City to Adopt
a Civil Rights Ordinance

Requested by: Mr. Fred P. Baggett
Associate City Attorney
City of Raleigh

Question: Does a municipal corporation have the
authority to enact a civil rights ordinance?

Conclusion:

Absent an express grant of authority by the General Assembly, a municipal corporation does not have authority to enact a civil rights ordinance.

The Raleigh Community Relations Commission adopted a Civil Rights Act for the City of Raleigh on August 12, 1975, and presented that proposed Civil Rights Act to the City Council for consideration. The City Council of Raleigh, through the City Attorney's office, has requested an opinion from this Office as to the authority of the city to adopt this proposed Civil Rights Act as an ordinance.

The proposed Civil Rights Act is patterned after and very similar to the Civil Rights Act of 1964, 42 USC 2000, et seq., the Civil Rights Act of 1968, 42 USC 3601, et seq., and the Age Discrimination and Employment Act of 1967, 29 US 621, et seq. Generally, this proposed ordinance would make unlawful discrimination in employment and housing on the basis of race, color, religion, national origin, sex or age. The enforcement of the provisions of this proposed ordinance would be vested in the Raleigh Commission on Human Rights. The Commission would be given broad and sweeping powers to enforce the provisions of the ordinance including the authority to employ attorneys and hearing examiners; to issue subpoenas and compel the attendance of witnesses; to require answers to interrogatories and the production of documents; to negotiate conciliation agreements and enforce the provisions of such agreements; to conduct hearings, enter findings of fact, conclusions of law and orders requiring parties to cease and desist unlawful practices; to direct that affirmative action be taken in the case of a finding of unlawful practices in employment and housing, including orders of reinstatement, the award of back pay, and the payment of other damages for humiliation and embarrassment. The Act further provides for judicial review of the orders of the Commission and provides that findings of the Commission shall be conclusive upon appeal unless clearly erroneous in view of the record as a whole.

This Office, in two previous opinions, has determined that municipal corporations are without authority to enact ordinances of a civil rights nature. (41 N.C.A.G. 478 (1969) and 41 N.C.A.G. (1969))

The General Assembly in 1971, however, rewrote and, in some instances, substantially altered and amended the statutes relative to the powers of municipal corporations. (Chapter 698 of the 1971 Session Laws) We will reconsider these earlier opinions in light of the changes in the statutes relating to municipal corporations.

Whether or not the General Assembly has given municipal corporations authority to adopt civil rights ordinances such as that now before the Raleigh City Council is dependent upon the construction of two statutes, G.S. 160A-492 and G.S. 160A-174. The first of these statutes, G.S. 160A-492, authorizes cities and towns to undertake the development and implementation of human relations programs. It provides:

"The governing body of any city, town, or county is hereby authorized to undertake, and to expend tax or nontax funds for, human relations,...programs. In undertaking and engaging in such programs, the governing body may enter into contracts with and accept loans and grants from the State or federal governments. The governing body may appoint such human relations,...committees or boards and citizens' committees, as it may deem necessary in carrying out such programs and activities, and may authorize the employment of personnel by such committees or boards, and may establish their duties, responsibilities, and powers. The cities and counties may jointly undertake any program or activity which they are authorized to undertake by this section. The expenses of undertaking and engaging in the human relations,...programs and activities authorized by this section are declared to be necessary expenses for which funds derived from taxation may be expended without the necessity of prior approval of the voters.

For, the purposes of this section, a 'human relations program' shall be defined as one devoted to the *study* of problems in the area of human relations, or to the *promotion* of equality of opportunity for all citizens, or to the *promotion* of understanding, respect and goodwill among all citizens, or to the

provision of channels of communication among the races, or to encourage the employment of qualified people without regard to race, or to encourage the youth to become better trained and qualified for employment." (Emphasis supplied)

This statute speaks in terms of studying, promoting and encouraging understanding and equality of opportunity for all citizens of the State. It does not speak in terms of the enforcement of civil rights. On its face, it would not seem to authorize the enactment of civil rights ordinances.

G.S. 160A-4, enacted since the date of our earlier opinions, however, deals with the construction to be placed upon the powers of a municipal corporation. It provides:

"It is the policy of the General Assembly that the cities of this State should have adequate authority to execute *the powers, duties, privileges, and immunities conferred upon them by law*. To this end, the provisions of this Chapter and of city charters shall be broadly construed and *grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect*: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State." (Emphasis supplied)

An analysis of the terms of this statute indicates that the General Assembly intended that municipal corporations have broad authority to execute "grants of power", not that these "grants of power" be construed as extending beyond those conferred by law. Even a broad and liberal construction of the power contained in G.S. 160A-492, in our opinion, would not authorize municipal corporations to enact ordinances such as the one here in question. Municipal corporations are authorized to *encourage* equality of opportunity. We do not believe that the word "encourage" can reasonably be construed as conferring upon cities and towns authority to *enforce* equality of opportunity. Certainly, the word

"encourage" can not be interpreted as conferring upon municipal corporations the broad and sweeping powers of enforcement contained in the proposed ordinance.

G.S. 160A-174 is the second statute which might conceivably confer upon municipal corporations authority to enact civil rights ordinances. G.S. 160A-174 establishes the general ordinance making authority of municipal corporations and provides, in pertinent part:

"A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."

It has long been the rule in North Carolina, and most other jurisdictions, that the powers of municipal corporations are subject to strict construction and, being creatures of the legislature, have no inherent power of their own and can exercise only such powers as are expressly conferred by the General Assembly or as are necessarily implied from those powers expressly given. *State v. McGraw*, 249 NC 205, 105 SE 2d 659; *Starbuck v. Havelock*, 252 NC 176, 113 SE 2d 278; *Shaw v. Asheville*, 269 NC 90, 152 SE 2d 136; *Koontz v. Winston Salem*, 280 NC 513, 186 SE 2d 897. The two earlier opinions of this Office, finding no authority in municipal corporations to enact civil rights ordinances, are based primarily upon strict construction of the general ordinance making authority of cities and towns. Two statutes included as a part of the rewriting of the municipal corporations laws in 1971, however, raise some question as to the continued viability of the rule of strict construction. The statutes are: G.S. 160A-4 and G.S. 160A-177.

G.S. 160A-4 is quoted above. As earlier indicated, we interpret G.S. 160A-4 as requiring a broad construction of those powers granted a municipal corporation; not a broad construction of the grants of power to municipal corporations. Thus, this statute does not abrogate the rule in North Carolina that a municipal corporation has no inherent power of its own and can exercise only such powers as are expressly conferred by the General Assembly or as are necessarily implied from those powers expressly given. G.S. 160A-4 appears merely to be a codification of the rule in this State that

a municipal corporation may exercise all the powers within the fair intent and purpose of its creation which are reasonably necessary to give effect to those powers granted, and in doing this, may exercise discretion as to the means to the end. *Keeter v. Town of Lake Lure*, 264 NC 252, 141 SE 2d 634; *Riddle v. Ledbetter*, 216 NC 491, 5 SE 2d 542.

G.S. 160A-177 is the second statute which might conceivably affect the rule of strict construction. It provides:

"The enumeration in this Article or other portions of this Chapter of specific powers to regulate, restrict or prohibit acts, omissions, and conditions shall not be deemed to be exclusive or a limiting factor upon the general authority to adopt ordinances conferred on cities by G.S. 160A-174."

The intent of this statute is plain. It is a legislative declaration that the maxim *expressio unius est exclusio alterius* shall not be applied in the construction of the powers of municipal corporations so as to limit the powers of municipal corporations to those expressly conferred. In other words, G.S. 160A-177 amounts to a legislative declaration that the list of expressed powers conferred upon municipal corporations shall not be deemed to be an exclusive list of those powers.

While this statute does somewhat limit the scope of the rule of strict construction, it does not abolish the rule of strict construction. In this particular situation, it merely means that the absence of specific legislative authority to enact civil rights ordinances is not determinative of the question of the authority of cities and towns to do so.

It is the general rule that municipal corporations are without authority to adopt civil rights ordinances.

"While a municipality must observe and itself not violate constitutional statutory guarantees of equality of civil rights irrespective of race or social condition, insofar as these guarantees bind municipal governments, a municipal corporation ordinarily is

without power to legislate upon or extend equality of civil rights." McQuillin, *Municipal Corporations*, Vol. 7, Section 24.430.

We find nothing in Chapter 160A of the General Statutes which either expressly or impliedly authorizes municipal corporations to enact a civil rights ordinance of the scope and type now before the Raleigh City Council. Indeed, we find the contrary intent. The general power of a municipal corporation to provide for the general welfare of its inhabitants is found in G.S. 160A-174. The specific authority of municipal corporations in the area of equality of opportunity is found in G.S. 160A-492. It is a well recognized and unquestioned rule of statutory construction that where one statute deals with subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general terms, the particular statute will ordinarily be controlling over the general. *National Food Stores v. North Carolina Board of Alcoholic Control*, 268 NC 624, 151 SE 2d 582; *State ex rel Utilities Commission v. Union Electric Membership Corporation*, 2 NC App. 309, 164 SE 2d 889. We find this rule to be applicable in this particular situation and are of the opinion that the authority of municipal corporations to act in the area of civil rights is limited by the provisions of G.S. 160A-492. We further are of the opinion that even the most liberal and broad construction of 160A-492 does not authorize municipalities to enact ordinances *enforcing* civil rights.

In conclusion, it is the opinion of this Office that a municipal corporation, absent specific authority from the General Assembly, does not have authority to adopt any ordinance enforcing civil rights. While expressing no opinion, we would further note that the proposed ordinance before the City Council of Raleigh raises serious questions concerning improper delegation of authority.

Rufus L. Edmisten, Attorney General
Edwin M. Speas, Jr.
Special Deputy Attorney General

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22 October 1975

Subject: Municipalities; Federal Water Resources
Development Projects; Agreement to

Maintain Project after Completion;
Contracting a Debt

Requested by: Mr. Vernon H. Rochell
City Attorney
City of Kinston

Question: Does an agreement to maintain and operate a federal water resources development project constitute the contracting of a debt?

Conclusion: No.

Part 4, Article 21, Chapter 143 (G.S. 143-215.38 through G.S. 143-215.43), entitled "Federal Water Resources Development Projects", provides that "...governing bodies of the several municipalities...are hereby authorized to adopt such resolutions or ordinances...for the fulfillment of the required items of local cooperation...as conditions precedent to the accomplishment of river and harbor, flood control or other such civil works projects...." (G.S. 143-215.40(a)) "Such resolutions and ordinances may irrevocably bind such...municipality...to maintain and operate the project after completion." (G.S. 143-215.41) "(M)unicipal governing bodies shall also have the power to accept funds, and to use general tax funds for necessary project purposes, including project maintenance." (G.S. 143-215.43) "Each city may levy property taxes for one or more of the following purposes subject to the rate limitation set out in subsection (d):...(33) Water Resources. - To participate in federal water resources development projects." (G.S. 160A-209(c)) The foregoing statutes authorize a municipality to enter into an agreement to maintain and operate a project after completion and to use general tax funds for such maintenance.

The question raised is whether such an agreement constitutes the contracting of a debt secured by a pledge of the municipality's faith and credit under Section 4(2) of Article V of the Constitution of North Carolina. Section 4(5) of Article V states that "(a) debt is incurred within the meaning of this Section when a...city...borrows money. A pledge of faith and credit within the meaning of this

Section is a pledge of the taxing power." The agreement to maintain and operate a project after completion constitutes neither the borrowing of money nor a pledge of the taxing power. Therefore, such agreement is not the contracting of a debt secured by a pledge of the municipality's faith and credit. However, if the maintenance cost of the project shall cause the rate limitation set out in G.S. 160A-209(d) to be exceeded in any given year, then approval of an increase in the property tax limitation by a vote of the people is required as set forth in G.S. 160A-209(f). Alternatively, a vote of the people may approve a levy of property taxes for the maintenance cost of the project as set forth in G.S. 160A-209(e) and thereafter, such taxes shall not be counted for purposes of the rate limitation imposed in G.S. 160A-209(d).

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Assistant Attorney General

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22 October 1975

Subject: North Carolina Department of Correction;
Duties of Probation Officers; Tour of
Prison Unit as Condition of Probation

Requested by: Mr. James Peeler Smith
Senior Administrative Assistant
Department of Correction

Question: Do the provisions of Chapter 229 of the
Session Laws of 1975 amending
G.S. 15-205 require a probation officer to
take the probationer on a tour of a prison
unit maintained by the Department of
Correction within the first 30 days of the
person's probation?

Conclusion: A probation officer is required to take the
probationer on a tour of a prison unit
maintained by the Department of

Correction within the first 30 days of a person's probation unless the tour is specifically prohibited by the court.

By enactment of Chapter 229 of the Session Laws of 1975, the General Assembly amended G.S. 15-205 to read as follows:

"G.S. 15-205. *Duties and powers of the probation Officer* - Such officer shall use all practicable and suitable methods, not inconsistent with the conditions imposed by the Court, or the Secretary of Correction, to aid and encourage persons on probation to bring about improvement in their conduct and condition, *and shall within the first 30 days of a person's probation take such person to a prison unit maintained by the Department of Correction for a tour thereof* so that he may better appreciate the consequences of probation revocation." (Emphasis supplied.)

This provision specifically provides that the probation officer *shall* take the prisoner on a tour of a prison unit maintained by the Department of Correction within the first 30 days of a person's probation unless such a tour would be inconsistent with express conditions imposed in the probationary judgment by the sentencing court. For example, if the court provides as a condition of suspension of sentence that the probationer not be taken on the tour, then, in that event, the probation officer would be excused from his statutory duty.

Furthermore, Chapter 229 was entitled:

"AN ACT TO INCLUDE IN THE DUTIES OF PROBATION OFFICERS A REQUIREMENT THAT THEY TAKE THEIR PROBATIONERS TO A PRISON UNIT EARLY IN THE TERM OF PROBATION IN ORDER THAT THE PROBATIONERS MIGHT HAVE A BETTER APPRECIATION OF THE CONSEQUENCES OF PROBATION REVOCATION AND TO PROVIDE THAT SUCH TOUR SHALL BE A CONDITION OF PROBATION."

It is evident that the General Assembly intended that the tour be a part of the rehabilitative program of every probationer.

Chapter 229 also amended G.S. 15-199, Conditions of probation, by adding the following to the list of possible conditions:

"(15) Within the first 30 days of his probation, visit, with his probation officer, a prison unit maintained by the Department of Correction for a tour thereof so that he may better appreciate the consequences of probation revocation."

The conditions listed in G.S. 15-199 are to be used in the discretion of the court, as evidenced by the language of G.S. 15-199:

"*Conditions of probation.* - The court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, or any other:"

The addition of the new statutory condition No. 15, i.e., the requirement of a prison tour, to the list of discretionary conditions demonstrates the legislative intent that the tour be approved as a court-imposed condition of probation.

Therefore, if the probationer were to refuse to take the prison tour, the probation officer should include such refusal in his written report to the court or the Secretary of Correction as required by G.S. 15-205 for further consideration of the probationer's case, or if appropriate, ground the notice of intention to pray revocation upon this failure of the probationer to comply with the statutory terms of his probation.

Rufus L. Edmisten, Attorney General
Jacob L. Safron
Special Deputy Attorney General
Jack L. Cozort
Associate Attorney

22 October 1975

Subject: Education; Local Boards of Education;
Credit Union Deductions

Requested by: Mr. C. Wade Mobley
Superintendent
Rowan County Board of Education

Mr. D. S. Coble
Superintendent
Hyde County Schools

Question: Are local boards of education required to
make payroll deductions for credit unions?

Conclusion: Yes.

The Rowan County Board of Education and Hyde County Board of Education have received written requests from several teachers to deduct specified amounts from their monthly checks for purposes of making installment payments on loans from the Rowan County Teachers' Credit Union and State Employees' Credit Union respectively. In Rowan County, the payroll for the Board of Education is processed and prepared by county employees through an agreement with the County Commissioners. The computer presently being used to prepare this payroll is operating at maximum capacity and cannot process the deductions requested. In Hyde County, the payroll is prepared by employees of the Board of Education. The Board of Education is reluctant to agree to the requests for payroll deductions because of the extra workload which will be placed upon a limited office staff.

G.S. 115-153.3 deals with payroll deductions for credit unions. It provides:

"Any public school teacher who is a member of a credit union organized and established under Chapter 54 of the General Statutes may, by executing a written consent to the county or city administrative unit by whom employed, authorize periodical payment

or obligation to such credit union to be deducted from their salaries or wages, and such deductions *shall be made* and paid to said credit union as and when said salaries and wages are payable." (Emphasis supplied.)

The terms of the statute are clear. Upon receipt of a written request from a teacher, a board of education is required to deduct periodic payments from the teacher's salary and pay that amount to any credit union organized pursuant to Chapter 54 of the General Statutes. Both credit unions involved here are organized, established and registered with the Administrator of Credit Unions pursuant to the requirements of Article 108 of Chapter 54 of the General Statutes. We assume written requests have been made by the teachers. It is our opinion that the boards of education are required to make the deductions requested.

We are well aware of the administrative difficulties and burdens local boards may face in complying with the provisions of G.S. 115-153.3. This statute, however, speaks in mandatory terms. It is unambiguous and susceptible of no other construction. We would hope that the credit unions involved could cooperate with the local boards of education so as to alleviate any administrative inconvenience or difficulties.

Rufus L. Edmisten, Attorney General
Edwin M. Speas, Jr.
Special Deputy Attorney General

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22 October 1975

Subject: Motor Vehicles; Speeding; Limited Driving Permit

Requested by: Mr. E. Burt Aycock, Jr.
Assistant District Attorney

Questions: (1) Does G.S. 20-16.1(b) apply to offenses of speeding 71 mph through 75 mph?

(2) Does G.S. 20-16.1(b) apply to speeds in excess of 75 mph?

(3) Does G.S. 20-16.1(b) apply to speeds in excess of 80 mph?

(4) When a limited permit is issued pursuant to G.S. 20-16.1(b) by the court upon conviction or a plea of guilty to a speeding charge requiring a mandatory 30 day revocation and such speed is such as to give rise to a discretionary revocation by the Department of Motor Vehicles for a greater period, may the limited driving privilege issued by the court be extended to cover the revocation by the Department of Motor Vehicles?

conclusions:

(1) Yes.

(2) Yes.

(3) Yes.

(4) No.

s to conclusions 1, 2 and 3, G.S. 20-16.1 reads in pertinent part follows:

"§ 20-16.1. *Mandatory suspension of driver's license upon conviction of excessive speeding; limited driving permits for first offenders.*—(a) Notwithstanding any other provisions of this Article, the department shall suspend for a period of 30 days the license of any operator or chauffeur without preliminary hearing on receiving a record of such operator's or chauffeur's conviction of exceeding by more than 15 miles per hour the speed limit, either within or outside the corporate limits of a municipality, if such person was also driving at a speed in excess of 55 miles per hour at the time of the offense.

(b)(1) Upon a first conviction only of violating

subsection (a), the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be considered...."

From the wording of the statute, if the speed for which convicted is more than 15 mph over the posted limit and over 55 mph subsection (b)(1) would become applicable; provided such conviction was the first under subsection (a). For example, 56 mph in a 3 mph zone could result in the issuance of a limited driving privilege as could 100 mph in a 55 mph zone.

As to conclusion 4, G.S. 20-16.1(b)(5) and (e) read:

"(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina."

"(e) The provisions of this section shall not prevent the suspension or revocation of a license for a longer period of time where the same may be authorized by other provisions of law."

The limited driving privilege issued pursuant to G.S. 20-16.1(b)(1) could be valid for the 30 day mandatory period of revocation but could not affect an additional period of revocation if permitted by statute and invoked by the Department of Motor Vehicles. For example, if the permittee had a previous conviction of speeding in excess of 55 mph or a conviction for careless and reckless driving within the previous 12 months, the Drivers' License Division could revoke up to six months under G.S. 20-16(a)(9) and G.S. 20-19(a) or for 12 months if the speed was in excess of 75 mph in a 70 mph zone or over 80 mph in a 70 mph zone. G.S. 20-16(a)(10) and G.S. 20-19(b); G.S. 20-16(a)(10a) and G.S. 20-19(c)

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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4 October 1975

Subject: Courts; Payment of Expenses to Local ABC
Law Enforcement Officers

Requested by: Mr. Donald M. Jacobs
District Attorney
Eighth Judicial District

Question: May the court order, as a condition of
probation, that a defendant convicted of
violation of ABC laws pay restitution to
the local ABC law enforcement board for
its "cost expenses"?

Conclusion: The court is without authority to order a
convicted defendant to reimburse local
ABC officers for their cost expenses as a
condition of probation for the convicted
defendant, or for any other reason.

G.S. 15-197 and 15-199 give to the court the power to suspend
sentence and determine and impose conditions of probation for
a convicted defendant. Included among the conditions of probation
allowed by G.S. 15-199 is the following:

"(10) Make reparation or restitution to the aggrieved
party for the damage or loss caused by his offense,
in an amount to be determined by the court."

It is settled law in North Carolina that the court has authority to
impose a prison sentence and suspend the sentence upon conditions
that the defendant make compensatory damages to the victim
injured by his criminal act. *State v. Caudle*, 276 N.C. 550, 173 S.E.
2d 778 (1970). It is clear that the court's authority to order payment
of restitution by convicted defendants is limited to the power to

give restitution to the aggrieved party, the victim of the defendant's crime, and not a state agency for its expenses in investigation of the crime. The local ABC enforcement group is clearly not a victim of the crime of violating ABC laws. Thus, the court is ordering instead of restitution to a victim, reimbursement for government expenses for the action, which is in the nature of "costs."

At common law, costs for criminal actions were unknown. *Arnold v. State*, 76 Wyo. 445, 306 P. 2d 368 (1957). "Costs in criminal proceedings are a creature of statute, and a court has no power to award them unless some statute has conferred it." *U.S. v. Gaines*, 100 U.S. 422, 25 L. Ed. 733 (1880) In the absence of such special statutory authorization, a court has no power to award cost against a defendant on conviction. *Lindsey v. Dykes*, (Supreme Court of Florida), 175 So. 792 (1937) North Carolina decisions have followed the rule that only the costs provided for by statute are allowed in criminal actions. See *State v. Patterson*, 224 N.C. 471, 31 S.E. 2d 380 (1944).

For costs in criminal actions, North Carolina G.S. 7A-304 (a) and (c) provide:

"(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides:

* * *

(c) The costs set forth in this section are complete and exclusive, and in lieu of any and all other costs and fees, except that witness fees, jail fees and costs of necessary trial transcripts shall be assessed as provided by law in addition thereto. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures ordering restitution."

There is no provision in this statute providing for the court to order a convicted defendant to pay the costs of investigation to the local ABC enforcement officers for their work in preparing the case, nor can the order of payment of expenses be justified as within the discretion of the court to order the defendant to pay a fine. Article X, Section 7 of the North Carolina Constitution provides:

"All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

It must therefore follow that all fines collected in the State for violations of the criminal laws of the States belong to the common school fund of the county where they are collected. Proceeds from these fines cannot be diverted or withheld from the school fund without violating the State Constitution. *Board of Education v. Town of Henderson*, 126 N.C. 689, 36 S.E. 158 (1900).

Article XI, Section 1, of the North Carolina Constitution provides for punishment:

"The following punishments *only* shall be known to the laws of this State: death, imprisonment, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State." (Emphasis supplied.)

The courts may impose only such punishments as are authorized by this section. *State v. Cole*, 241 N.C. 576, 86 S.E. 2d 203 (1955). Therefore, in order for a payment of money to be valid as part of a sentence for a criminal conviction, it must be either in the nature of costs, restitution, or fines. Since restitution goes only to compensate the victim of the crime, and costs go only to pay for those expenses authorized by statute, and fines go only to the county education fund, a trial court judge has no authority to order a convicted defendant to pay the expenses of local ABC officers.

Moreover, Article 2 (ABC Boards and Enforcement) of Chapter 18. (Regulation of Intoxicating Liquors) of the General Statutes provide for the expenses of the operation of county ABC boards:

"(a) All salaries and expenses incurred under the provisions of this Article, except those provided for in G.S. 18A-14, shall be paid out of the proceeds of the sales of the alcoholic beverages referred to in this Article. All salaries and expenses of the county boards and their employees shall be paid out of the receipts for their sales as operating expenses." G.S. 18A-18

It is the view of this Office that there is no constitutional or statutory provision which authorizes a trial court judge to order a convicted defendant to pay the expenses of a local ABC county board.

Rufus L. Edmisten, Attorney General
Jack Cozort
Associate Attorney

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28 October 1975

Subject: Credit Unions; Share Draft Service;
G.S. 54-109.12; G.S. 54-109.3(9), (10)
G.S. 54-109.21(23) and G.S. 54-109.22

Requested by: Mr. William L. Cole
Credit Union Administrator

Question: May the Credit Union Administrator of the
State authorize State chartered credit
unions to provide share draft services to
their members?

Conclusion: Yes.

A share draft service would operate in the following manner:

The credit union would supply the member with blank "share drafts" which would be payable through a commercial bank, similar to "payable through" drafts often used by other nonbank financial institutions. The member would execute the draft and deliver it to the payee who would present the draft to the "payable through" bank for payment. The "payable through" bank would, in accordance with Articles 3 and 4 of the Uniform Commercial Code, either honor or return the draft. If the bank honored the draft, the payment would be charged against an account maintained by the credit union with the bank. Subsequently the credit union would charge the amount of the draft against the member's share draft account. The draft would not be a check as defined by G.S. 25-3-104(2)(b) because it is not drawn on a bank.

Share drafts are not expressly provided for in the credit union laws of this State. Articles 14A through 14L inclusive, of Chapter 54 of the General Statutes. However, ample authority for the Administrator of Credit Unions to authorize, by regulation, the utilization of share drafts is contained in the statutes quoted hereinafter.

G.S. 54-109.12 provides, in pertinent part, "(t)he Administrator of Credit Unions may prescribe rules and regulations...relating to...practices and the conduct and management of credit unions...."

G.S. 54-109.3(9) and 54-109.3(11) provide that the suggested credit union by-laws to be prepared by the Administrator shall prescribe:

"(9) The conditions upon which shares may be issued, paid in, transferred, and withdrawn." and

"(11) The conditions upon which deposits may be received and withdrawn...."

G.S. 54-109.21, concerning general powers, allows North Carolina credit unions to:

"(23) Facilitate its members' purchase of goods and services in a manner which promotes the purposes of a credit union."

Further, under North Carolina law: "A credit union may exercise such incidental powers such as are necessary or requisite to enable it to promote and carry on most effectively its purposes." G.S. 54-109.22

Finally, Sections 54-109.53 and 54-109.55 reiterate the provision of Section 54-109.22 in allowing shares and deposits to be transferred in such a manner as the board of directors, through the by-laws, prescribes.

Our conclusion that share drafts are permissible in North Carolina is based on the power granted to the credit unions to provide for the transfer and withdrawal of shares in such manner as the by-law prescribe. A share draft is a method of transferring or withdrawing shares. Further, share drafts would serve to facilitate the purchase of goods and services by the members by making their funds represented by shares, more readily accessible. Share drafts therefore, would be permissible under G.S. 54-109.3 and 54-109.21

Rufus L. Edmisten, Attorney General
Millard R. Rich, Jr.
Deputy Attorney General

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30 October 1975

Subject: Mental Health; Area Mental Health Programs; Appointment of Budget Officer and Finance Officer

Requested by: Mr. Gene B. Gurganus
Chairman
Onslow County Area Mental Health Board

Question: In a single county area mental health program, does it violate the provisions of Chapter 159 of the General Statutes if the county budget and finance officers disburse area mental health program funds when the county budget and finance officers have

not been appointed as the budget and finance officers for the area mental health program?

Conclusion:

Yes. However, if they are not otherwise disqualified, appointment by the area mental health board of the county budget officer and county finance officer as budget and finance officers for the area mental health program is not prohibited.

For the purpose of implementation, the Local Government Budget and Fiscal Control Act, a single county mental health program should be considered as a "public authority." See 44 N.C.A.G. 185 (1974). With regard to such an entity, the following statutory provisions are pertinent:

"§159-9. *Budget officer.*—Each local government and public authority shall appoint a budget officer to serve at the will of the governing board. In counties or cities having the manager form of government, the county or city manager shall be the budget officer. Counties not having the manager form of government may impose the duties of budget officer upon the county finance officer or any other county officer or employee except the sheriff, or in counties having a population of more than 7,500, the register of deeds. Cities not having the manager form of government may impose the duties of budget officer on any city officer or employee, including the mayor if he agrees to undertake them. A public authority or special district may impose the duties of budget officer on the chairman or any member of its governing board or any other officer or employee." (Emphasis supplied)

"§159-24. *Finance officer.*—Each local government and public authority shall appoint a finance officer to hold office at the pleasure of the appointing board or official. The finance officer may be entitled 'accountant,' 'treasurer,' 'finance director,' 'finance officer,' or any other reasonably descriptive title. *The*

duties of the finance officer may be imposed on the budget officer or any other officer or employee on whom the duties of budget officer may be imposed."
(Emphasis supplied)

The above statutes obviously require that a budget officer and a finance officer be appointed by the area mental health board to act as such for the program, unless such duties are "imposed" as authorized by the cited statutes. However, there is no statutory prohibition, *per se*, upon the county budget officer and the county finance officer being appointed to perform these functions for the area mental health program. While the last sentences of G.S. 159-9 and G.S. 159-24 speak in terms of "imposing" the functions of budget and finance officers, respectively, on certain persons, they do not *limit* these appointments to these choices.

Clearly, if appointed, the positions of budget officer and finance officer are "public offices." Therefore, caution should be exercised to insure that on such appointment the provisions of G.S. 128-1.1 dealing with dual office holding are not violated. It would seem that appointment of a county budget officer as budget officer for the mental health program would amount to an appointment to an additional public office. The same would apply to appointment of a county finance officer as the finance officer for an area mental health program. On the other hand, if the position of budget officer and finance officer are combined in one person and he is appointed budget officer with the additional function of finance officer being "imposed" upon him, then, by virtue of this action, the individual has only been appointed to one additional public office, which is permitted under G.S. 128-1.1.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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31 October 1975

Subject: Social Services; Standard Number 5 of the Social Services Commission Standards for Selection of County Social Services Board Members; Unconstitutional Usurpation of Legislative Power by Social Services Commission in Imposing Additional Qualifications for Public Office

Requested by: Ms. Flora R. Garrett
Orange County Board of Commissioners

Question: Does the Social Services Commission have the power to impose a qualification, additional to that set forth in the General Statutes of North Carolina, for the public office of county social services board member?

Conclusion: No. The imposition of an additional qualification for the public office of county social services board member by the Social Services Commission amounts to an unconstitutional usurpation of a legislative prerogative.

Social Services Commission Standard Number 5 which has been in effect for many years provides:

"Board members shall not have any near relatives receiving financial assistance through the county department of social services on which board they serve. ('Near relatives' are defined as father, mother, brother, sister, husband, wife, son, daughter, half-brother, half-sister.)"

On August 15, 1975, this Office rendered an opinion concluding that the Commission was vested with the authority, under the broad rule-making powers established by G.S. 143B-153, to adopt standards for the selection of county social services board members.

The Opinion further concluded that Standard Number 5 would withstand scrutiny under the Fourteenth Amendment to the United States Constitution and Section 19 of Article I of the North Carolina Constitution.

On October 9, 1975, the Orange County Board of Commissioners submitted to the Attorney General a Memorandum of Points and Authorities in support of a request that the prior opinion be reconsidered under Article VI of the State Constitution pertaining to "Suffrage and Eligibility to Office." This Memorandum was transmitted to the Social Services Commission for information and comment. After receiving the responses of the various members of the Commission, this Office commenced a review of the question presented.

It is well settled in North Carolina that as to Constitutional Offices, the only qualifications and disqualifications therefor are those expressly enumerated in the State Constitution, Article VI. As to those Offices created by legislative enactments, qualifications may be prescribed therefor by the General Assembly.

"The distinction between offices of constitutional origin and those created by statute, as to their control by the Legislature, has been repeatedly recognized, and the rule has been often announced that an office created by legislative action is wholly within the control of the Legislature which can declare, the manner of filling it, how, when, and by whom the incumbent shall be elected or appointed, and to change from time to time the mode of election or appointment....

* * *

(W)hile admitting that there can be no disqualification for office added by the Legislature as to offices created by the Constitution..., it seems to me that, as to positions created by the General Assembly having the authority to create the office, it can prescribe term and salary and tenure, and change or abolish these at will...." Concurring opinion of Chief Justice Clark in *Cole v. Sanders*, 174 N.C. 112, 93 S.E. 476 (1917).

The public office of county social services board member, formerly county welfare board member, established by the Legislature has only one statutory qualification, that the member be a *bona fide* resident of the county from which he is appointed to serve (G.S. 108-9(c)). Additional qualifications for that office may only be fixed by the General Assembly, not the Social Services Commission. As Standard Number 5 constitutes an additional qualification for the Office of County Social Services Board member, it represents an unconstitutional usurpation of a legislative power. Article II, North Carolina Constitution.

The Office of the Attorney General is not unaware of the responsibility of the Social Services Commission to adopt rules and regulations it may deem necessary and desirable for the administration of the public assistance programs in North Carolina. Nor is this Office insensitive to the policy determination of the Commission that there be certain qualifications an individual should meet as a condition precedent to serving on a county board of social services. Nevertheless, we are unable, for the reasons expressed above, to sanction the qualification embodied in Standard Number 5. The proper recourse for the Commission is to petition the General Assembly to prescribe additional qualifications for the Office.

It goes without saying, of course, that any member of a county board of social services who is in a conflict of interest situation should disqualify himself from further consideration of the matter at hand. Insofar as 45 N.C.A.G. 36 (1975) is inconsistent with this Opinion, it is withdrawn and should be disregarded.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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6 November 1975

Subject: Youth Services; Relationship Between
Commission of Youth Services, Office for
Children, and Governor's Advocacy
Council on Children and Youth; Authority

to Resolve Disagreement Between Agencies
Within the Department of Human
Resources

Requested by:

Mr. D. P. Dickey
Director of Planning
Division of Youth Services

Questions:

(1) What is the legal relationship between the Commission of Youth Services, the Governor's Advocacy Council on Children and Youth, and the Office for Children?

(2) In the event of a conflict in policy between the Commission of Youth Services and the Office for Children over the operation of the Division of Youth Services Training Schools, which body has the final authority to resolve the conflict?

Conclusions:

(1) The Commission of Youth Services is a body within the Department of Human Resources vested with policy-making authority in the area of committed delinquent children. The Governor's Advocacy Council on Children and Youth was created to act as an advocate for all children and youth with the responsibility for reporting and recommending to appropriate agencies on the subject of improving the delivery of services to children and youth. The Office for Children is an administratively created unit within the Department of Human Resources (which includes the Governor's Advocacy Council on Children and Youth and other agencies) with an assistant secretary in charge to whom has been delegated the exercise of the management authority of the Secretary of Human

Resources over all agencies of the Department regarding programs for children.

(2) If what is involved is unquestionably policy and not management, the Commission of Youth services is the policy-making body. If what is involved is a question as to whether the matter falls within the policy-making area or the management area, the issue should be resolved by the Governor of North Carolina.

It appears that, for purposes of efficiency of operations the Secretary of Human Resources has administratively created the Office for Children to include the following prior existing agencies: the Governor's Advocacy Council on Children and Youth, the Council on Developmental Disabilities, and the Office of Child Development. An assistant secretary has been placed in charge of this newly created unit. The Secretary of Human Resources has delegated to this assistant secretary the authority to exercise the management functions vested in the Secretary of Human Resources by the General Statutes. See G.S. 143B-10 and G.S. 143B-14(a).

As to the Commission of Youth Services, G.S. 134-7 provides:

"The commission shall be a policy-making body within the Department with responsibility for approval of policies and procedures as may be proposed by staff which will provide institutional programs to meet the needs of the children in care and to develop other youth services programs as may be needed."

Further, the General Assembly provided that the Commission of Youth Services is created "...within the Department of Human Resources to be responsible for administration of institutions for committed delinquent children and to work with other appropriate units of the department to develop and utilize community-based services for committed delinquents where appropriate and feasible." See G.S. 134-3.

As was recognized by the General Assembly at the time of ratification of the Executive Organization Act of 1973, it is not always simple to ascertain the exact line of demarcation between matters falling within the area of policy-making and the area of management. Thus, the following statutory method of arbitrating disagreements in this area is as follows:

"§ 143B-4. *Policy-making authority and administrative powers of Governor; Delegation.*—The Governor, in accordance with Article III of the Constitution of North Carolina, shall be the Chief Executive Officer of the State. The Governor shall be responsible for formulating and administering the policies of the executive branch of the State government. Where a conflict arises in connection with the administration of the policies of the executive branch of the State government with respect to the reorganization of State government, the conflict shall be resolved by the Governor, and the decision of the Governor shall be final."

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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6 November 1975

Subject: Human Resources; Youth Services;
Personnel Grievance Procedures; Authority
to Hire and Discharge Employees of the
Division of Youth Services

Requested by: Mr. D. P. Dickey
Director of Planning
Division of Youth Services

Questions: (1) In a situation wherein an employee
at a Youth Services Training School is
discharged by the Director of Youth

Services and appeals such discharge through the Department of Human Resources Grievance Procedures, does the Secretary of Human Resources have the authority to order the individual reinstated or retained?

(2) In general, in the event of a difference of opinion between the Director of Youth Services and the Secretary of Human Resources over a decision to hire or discharge an individual employed by the Division of Youth Services, which official has the final authority to resolve the matter?

Conclusions:

(1) Yes.

(2) G.S. 134-12 and G.S. 134-13 specify the individuals who are authorized to initially appoint or discharge employees of the Division of Youth Services. However, in the case of a discharge action, this action is appealable through the Department of Human Resources Grievance channels and procedures and the Secretary of Human Resources has the authority to resolve the matter, subject to the individual's right to appeal an adverse determination to the State Personnel Board.

G.S. 134-12 authorizes the Director of Youth Services to appoint or remove the head of each institution thereunder, subject to personnel policies of the Commission of Youth Services and pertinent State statutes, and to appoint central office staff. Under the provisions of G.S. 134-13, the administrative head of each institution or youth services program is responsible for the appointment of subordinate personnel in consultation with the Director; the administrative head of each institution or youth services program may discharge these employees for cause, in accordance with State Personnel policies and with the Director's approval.

As to all State employees (other than those specifically exempt) the State Personnel Board is authorized to establish policies and rules governing their "appointment, promotion, transfer, demotion, suspension, and separation", as well as "the hearing of appeals of applicants, employees, and former employees...." See G.S. 126-4(6),(9), and G.S. 126-5. Under current rules of the State Personnel Board, the grievance procedures within each principal department--prior to reaching the level of consideration by the State Personnel Board--are prescribed by the Department under recommended general guidelines furnished by the State Personnel Board.

By the action of the last General Assembly, the institutions involved in the present questions were transferred to the Department of Human Resources for administration. See G.S. 134-6. The Director of Youth Services, though responsible for the administration of the institutions and other youth services programs, fulfills the policies and procedures of the Commission of Youth Services "under the administrative supervision" of the Secretary of Human Resources. See G.S. 134-10.

Additionally, turning to the basic concept of the Organization Act of 1973, all management functions are performed by or under the direction and supervision of the head of the principal State department. These functions are defined as including planning, organizing, staffing, directing, coordinating, reporting and budgeting. More specifically, all employees within the Department of Human Resources are "under the supervision, direction and control" of the Secretary of Human Resources. See G.S. 143B-10, and G.S. 143B-136 through 139.

Therefore, by reasonable correlation of the general provisions of the Organization Act of 1973 with the provisions of Chapter 134, it would appear that the initial hiring and discharge of an individual would be governed by G.S. 134-12 and G.S. 134-13. However, since Youth Services is included within the Department of Human Resources, the procedures involved in the grievance appeal of a discharged Youth Services employee would be governed by the same rules applicable to all other employees within the Department of Human Resources. Under those rules, as promulgated by the Secretary of Human Resources, the Secretary exercises the authority

to overrule the discharge action taken by a Director or lower level supervisor, and to direct restoration or retention of employment where that action is deemed appropriate.

It should be noted, however, that the opinion does not apply to situations involving teachers employed by the schools listed in G.S. 115-142(p). That sub-section specifically entitles those personnel to the grievance procedures prescribed in that section.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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19 November 1975

Subject: Handicapped Persons; General Statutes
Chapter 168; Statutory Construction,
Criminal Penalty, Civil Remedies;
Injunctions

Requested by: The Honorable James B. Hunt
Lieutenant Governor

Questions: (1) Can Chapter 168 of the General
Statutes of North Carolina, entitled
"Handicapped Persons," be criminally
enforced even though no criminal penalty
is prescribed?

(2) Can Chapter 168 of the General
Statutes of North Carolina, entitled
"Handicapped Persons" be civilly enforced
even though no specific civil remedy is
prescribed?

Conclusions: (1) Chapter 168 of the General Statutes,
entitled "Handicapped Persons," can be
criminally enforced even though no
criminal penalty is prescribed.

(2) Chapter 168 of the General Statutes of North Carolina, entitled "Handicapped Persons," can be civilly enforced even though no specific civil remedy is prescribed.

Neither a criminal penalty nor a civil remedy is specifically prescribed by Chapter 168 of the North Carolina General Statutes, which reads as follows:

"§ 168-1. *Purpose and definition.*--The State shall encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment. The definition of 'handicapped persons' shall include those individuals with physical, mental and visual disabilities. For the purposes of this Article the definition of 'visually handicapped' in G.S. 111-11 shall apply.

§ 168-2. *Right of access to and use of public places.*--Handicapped persons have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and all other buildings and facilities, both publicly and privately owned, which serve the public.

§ 168-3. *Right to use of public conveyances, accommodations, etc.*--The handicapped and physically disabled are entitled to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats, or any other public conveyances or modes of transportation; hotels, lodging places, places of public accommodation, amusement or resort to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

§ 168-4. *May be accompanied by guide dog.*--Every visually handicapped person shall have the right to be

accompanied by a guide dog, especially trained for the purpose, in any of the places listed in G.S. 168-3 provided that he shall be liable for any damage done to the premises or facilities by such dog.

§ 168-5. *Traffic and other rights of persons using certain canes.*—The driver of a vehicle approaching a visually handicapped pedestrian who is carrying a cane predominantly white or silver in color (with or without a red tip) or using a guide dog shall take all necessary precautions to avoid injury to such pedestrian.

§ 168-6. *Right to employment.*—Handicapped persons shall be employed in the State service, the service of the political subdivisions of the State, in the public schools, and in all other employment, both public and private, on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved.

§ 168-7. *Guide dogs.*—Every visually handicapped person who has a guide dog, or who obtains a guide dog, shall be entitled to keep the guide dog on the premises leased, rented or used by such handicapped person. He shall not be required to pay extra compensation for such guide dog but shall be liable for any damage done to the premises by such a guide dog.

§ 168-8. *Right to habilitation and rehabilitation services.*—Handicapped persons shall be entitled to such habilitation and rehabilitation services as available and needed for the development or restoration of their capabilities to the fullest extent possible. Such services shall include, but not be limited to, education, training, treatment and other services to provide for adequate food, clothing, housing and transportation during the course of education, training and treatment. Handicapped persons shall be entitled to these rights subject only to the conditions and limitations

established by law and applicable alike to all persons.

§ 168-9. *Right to housing.*--Each handicapped citizen shall have the same right as any other citizen to live and reside in residential communities, homes, and group homes, and no person or group of persons, including governmental bodies or political subdivisions of the State, shall be permitted, or have the authority, to prevent any handicapped citizen, on the basis of his or her handicap, from living and residing in residential communities, homes, and group homes on the same basis and conditions as any other citizen. Nothing herein shall be construed to conflict with provisions of Chapter 122 of the General Statutes."

Chapter 168 provides that handicapped persons shall be entitled to certain rights. Under general rules of statutory construction, where a statute "prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at Common Law, notwithstanding the fact that no punishment is prescribed in the statute." *State v. Bloodworth*, 94 N. C. 918 (1886). See also *State v. Bishop*, 228 N. C. 371, 45 S. E. 2d 858 (1947).

The punishment for an omission contrary to the command of the statute is prescribed in G.S. 14-3, which provides: "...every person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine or imprisonment for a term not exceeding two years or by both, in the discretion of the court."

Thus, a violation of Chapter 168 is a general misdemeanor, punishable by fine and imprisonment.

The civil remedies available for a violation of Chapter 168 are the remedies available at Common Law for deprivation of a right guaranteed by statute. These remedies include actions in tort for negligence or nuisance. These are separate torts, the former aimed at compensating a party for damages resulting from the negligence of another, and the latter aimed either at abating a nuisance or awarding permanent damages resulting from a nuisance.

In the case of handicapped persons denied the rights guaranteed by Chapter 168, an action to enjoin the operation of a nuisance is probably the remedy more likely to be sought.

Injunctions to abate nuisances can be of two types: prohibitory, to preserve the status quo, or mandatory, to require the party enjoined to do a positive act. In the case of action brought under Chapter 168, most of the injunctions sought will likely be mandatory in nature and will in many cases involve renovations to buildings, both publicly and privately owned.

Because this remedy is considered by the courts to be extreme, it will not be entered "except where a threatened injury is immediate, pressing, irreparable, and clearly established." 4 N.C. Index 2d, Injunctions §3.

Thus, a court confronted with this question will undoubtedly examine not only the nature of the nuisance sought to be remedied and the nature of the remedy, but also the ability of the agency or individual involved to respond, which could vary drastically from case to case. Thus, in some cases, where an agency or individual has funds sufficient for making renovations without creating any financial hardship, it is possible that a court would order drastic measures to assure accessibility for the handicapped. In other cases, however, where the financial resources of an agency or individual would be completely depleted by a large expenditure, a certain amount of leniency would be likely.

In conclusion, Chapter 168 would appear to encompass all of the remedies, both civil and criminal in nature, which generally accompany rights guaranteed by statute.

Rufus L. Edmisten, Attorney General
Ann Reed
Assistant Attorney General

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19 November 1975

Subject: Municipalities; Streets and Highways;
Subdivision Streets; Secondary Road
Standards

Requested by: Mr. Richard S. Jones, Jr.
County Attorney
Macon County

Questions: (1) Is G.S. 136-102.6, which requires developers to comply with certain subdivision requirements, applicable to subdivisions which were platted and recorded prior to October 1, 1975, the effective date of the Act?

(2) Is G.S. 136-102.6 applicable to the sale of a one-acre building site as a separate transaction from a 100-acre farm tract?

(3) If the plat of a subdivision clearly designates all roads shown thereon as private, is the Register of Deeds authorized to record the plat without any certification by the Board of Transportation?

(4) Is it still possible in the State of North Carolina to convey a portion of a tract of land outside the city limits by metes and bounds descriptions and without recording a plat thereof?

Conclusions: (1) No. Chapter 488 of the 1975 Session Laws, codified as G.S. 136-102.6, was passed June 5, 1975, and made effective October 1, 1975. The stated purpose of the Act is to insure that "new subdivision streets" as described in the Act "to be dedicated to the public will comply with the State standards for placing

subdivision streets on the State Highway System for maintenance" and to insure "that full and accurate disclosure of the responsibility for the construction and maintenance of private streets." G.S. 136-102.6(i). The Act does not apply to subdivisions which were platted and recorded prior to October 1, 1975, the effective date of the Act.

(2) No. The statute is only applicable "where such subdivision includes a new street or the changing of an existing street." G.S. 136-102.6(a). Therefore, the Act is not applicable to such a transaction, unless it involves the laying out or the dedication of a new street or the changing of an existing street.

(3) Yes. The District Engineer certifies approval "of the plans for the public street as being in accordance with the minimum standards for the Secondary Roads Council for acceptance of the subdivision street on the State Highway System for maintenance." G.S. 136-102.6(d). The certification required of the District Engineer relates only to those public streets which will become a part of the State Highway System. Therefore, if the subdivision only contains private streets, the Register of Deeds may record the plat without any certification by the Board of Transportation.

(4) Yes. Conveyances may still be made by metes and bounds description without recording a plat in the same manner as was done prior to the passage of Chapter 488 of the 1975 Session Laws, except for conveyances which involve a

subdivision which includes a new street or the changing of an existing street. G.S. 136-102.6(a) and (i). In case of conveyances of a portion of a tract of land which involves the laying out of or dedication of a new street or the changing of an existing street, the provisions of G.S. 136-102.6 have to be complied with.

The foregoing is in response to a request of October 21, 1975 for an opinion concerning G.S. 136-102.6.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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19 November 1975

Subject: Health; Applicability of Residential Care Facilities' Regulations to Family Foster Homes

Requested by: Miss Lela Moore Hall
Director of Social Services
New Hanover County

Question: Does G.S. 130-170 authorize the Commission for Health Services to adopt rules and regulations governing the sanitation of family foster homes?

Conclusion: G.S. 130-170 authorizes the Commission for Health Services to adopt rules and regulations governing the sanitation of family foster homes.

"To safeguard the health of patients, residents, and students of private hospitals, nursing and convalescent abodes, sanitariums, sanitoriums and educational or other institutions

in North Carolina, the Commission for Health Services is hereby authorized and empowered to make rules and regulations governing the sanitation of all such establishments and to provide a system of grading applicable thereto." (G.S. 130-170)

The Commission for Health Services, pursuant to G.S. 130-170, has adopted Rules and Regulations Governing the Sanitation and Other Aspects of Residential Care Facilities. "Residential Care Facility" is defined in Section 1-A of the rules as "an establishment, including a family foster home, providing food and lodging facilities on a 24-hour basis for not more than 12 residents, exclusive of staff, but shall not mean a private home or a boarding or rooming house." A "family foster home" is defined in the Division of Social Services' Family Services' Manual as follows:

"These family care homes care for as many as 5 children and are supervised by (1) county department of social services, or (2) by a private program licensed or approved to engage in child care or child placing activities. Most family foster homes receive financial reimbursement but some offer free care. All such homes must be licensed by the North Carolina Department of Human Resources...."

The question is therefore whether a foster family home is an institution under G.S. 130-170.

"That the word, 'institution', both in legal and colloquial use, admits of application to physical things, cannot be questioned. One of its meanings is an establishment, especially of a public character, affecting a community. And one of the meanings of 'establishment' is the place in which one is permanently fixed for residence or business...." (*Words and Phrases*, "Institutions")

Webster's New Collegiate Dictionary (1973 Edition) defines "institution": as "a significant practice, relationship or organization in a society or culture (the - of marriage)" and "an established organization or corporation (as a college or university) esp. of a public or eleemosynary character."

The word "institution" may be found in G.S. 108-78(a), to wit: "The Department of Human Resources shall inspect and license private child-caring institutions in the State under rules and regulations adopted by the Social Services Commission...." G.S. 110-49 provides, in part, that: "No individual, agency, voluntary association, or corporation seeking to establish and carry on any kind of business or organization in this State for the purpose of giving full-time care to children...shall be permitted to organize and carry on such work without having first secured a written permit from the Department of Human Resources.... Upon establishment as provided above, every such organization...shall annually procure a license from the Department of Human Resources...."

Examination of G.S. 108-78 and 110-49 indicate that the word "institution" in the former statute relates to organizations established for the purpose of giving full-time care to children. The word "organization" in G.S. 110-49 specifically includes "individual, agency, voluntary association, or corporation". Two parents, operating a family foster home, are individuals giving full-time care to children and are a private child-caring institution under G.S. 108-78.

The expressed intent of G.S. 130-170 is to protect patients, residents, and students in certain privately operated facilities. As determined herein, family foster homes are institutions for the purposes of G.S. 108-78. In the case of *In re Proposal C*, 384 Mich. 390, 185 NW 2d 9 (1971), the Court, in determining whether family foster homes were eligible for receipt of public monies for educational purposes, stated "Fosterhomes (sic) are special institutions for special children.... A private fosterhome (sic) is in many ways the private counterpart to the State institutions under the purview of the Department of Social Welfare...." (at 425, 25) As noted previously, *Webster's New Collegiate Dictionary* defines "institution" as an established organization of a public or eleemosynary character.

The statute safeguards individuals which are entrusted to private organizations for charitable and quasi-public purposes. Children placed in family foster homes are in need of services from the county department of social services, and the family foster homes assist in providing such services. The statute should not be construed as

providing sanitation standards for buildings designated for certain purposes rather than providing sanitation standards for the environment of a certain class of individuals, i.e. those entrusted to private organizations for charitable and quasi-public purposes. Therefore, it is the opinion of this Office that G.S. 130-170 authorizes the Commission for Health Services to adopt rules and regulations governing the sanitation of family foster homes.

It should be noted that if the opposite conclusion had been reached, the sanitation standards contained in the Commission for Health Services rules and regulations under discussion herein would apply in any event because they have been incorporated verbatim into the rules and regulations of the Social Services Commission which apply to family foster homes under G.S. 108-78.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Assistant Attorney General

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25 November 1975

Subject: District Attorneys; Assistant District Attorneys

Requested by: Mr. William C. Griffin, Jr.
District Attorney
Second Judicial District

Questions: (1) Is it lawful under the law of North Carolina for a District Attorney to hire additional Assistant District Attorneys where he has funds from local sources to do so even though such personnel are not authorized by G.S. 7A-41 and G.S. 7A-63?

(2) Is it lawful under the law of North Carolina for the salaries of the District Attorney and his staff to be supplemented by funds from local sources?

Conclusions:

(1) No. It is unlawful under the law of North Carolina for a District Attorney to hire additional Assistant District Attorneys even though he has additional local funds to do so, because such personnel are not authorized by G.S. 7A-41 and G.S. 7A-63.

(2) No. It is unlawful under the law of North Carolina for the salaries of the District Attorney and his staff to be supplemented by funds from local sources.

Article 4 Section 18 of the North Carolina Constitution provides:

"District Attorneys. The General Assembly shall, from time to time, divide the State into a convenient number of prosecutorial districts, for each of which a District Attorney shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duty related to appeals therefrom as the Attorney General may require and perform such other duties as the General Assembly may prescribe."

As such, the District Attorney is a constitutional officer of the State of North Carolina and his actions, duties and responsibilities are therefore controlled by statute.

In addition, Article 7 of Chapter 7A provides for the organization of the General Court of Justice and the number of personnel allocated to each judicial district by the General Assembly. Article 9 of Chapter 7A sets out in detail the provisions pertaining to District Attorneys and Assistant District Attorneys. The mandates of these statutes are conclusive.

G.S. 7A-41 specifies the number of full-time Assistant District Attorneys in each judicial district. The number allocated by the General Assembly to each district is determined by the need and size of the district. The General Assembly's allocation is exact and no provision in the statute allows the District Attorney to exceed the number of "full-time Assistant District Attorneys." G.S. 7A-64 does provide for temporary assistance when the dockets are overcrowded. However, the statute specifically states that compensation for such temporary appointees shall be fixed by the Administrative Office of the Courts. This would preclude any compensation being paid from local funds.

G.S. 7A-65 provides:

"The annual salary of District Attorneys and full-time Assistant District Attorneys shall be provided in the Budget Appropriations Act."

The legislative mandate that compensation and allowances of District Attorneys and full-time Assistant District Attorneys shall be by legislative actions and not by funds from any local source could not be any clearer.

Article 4 Section 20 of the North Carolina Constitution provides in part:

"The operating expenses of the judicial department other than compensation to process servers and other locally paid nonjudicial officers, shall be paid from State funds."

Therefore, the District Attorney, being a constitutional official of the judicial branch of government, must be paid from State funds. Also, any Assistant District Attorney on his staff must be paid from State funds as they are the alter ego of the District Attorney himself and represent that constitutionally delegated office.

It is the opinion of this Office that supplementing a District Attorney or Assistant District Attorney's salary by funds provided from local sources is not allowed by North Carolina law. G.S. 7A-65 specifically provides for the compensation of District Attorneys and

full-time Assistant District Attorneys, as they are constitutional officers within the judicial branch of government.

In addition, G.S. 7A-63 provides that Assistant District Attorneys shall devote their full time to the duties of their office and shall not engage in the private practice of law during their terms. To allow an Assistant District Attorney to receive funds from a local source in addition to his yearly salary would create a conflict of interest. While not necessarily being in the private practice of law, such an acceptance of local funds by a District Attorney or Assistant District Attorney would put him in the position of serving two masters at the same time, not to mention the embarrassing situation that would arise in having to prosecute a member of the organization which was providing the extra funds. This would clearly be a conflict of interest and might jeopardize the impartiality of the District Attorney's office.

Rufus L. Edmisten, Attorney General
T. Lawrence Pollard
Associate Attorney

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25 November 1975

Subject: Wildlife Resources Commission; Regulatory
Authority in Joint Fishing Waters
G.S. 113-132 and G.S. 113-321

Requested by: Mr. Clyde P. Patton
Executive Director
Wildlife Resources Commission

Question: Does the Wildlife Resources Commission
have authority to regulate the taking of
striped bass in joint fishing waters as
defined in G.S. 113-321 and North
Carolina Inland Fishing Regulation 1-75c

Conclusion: The Wildlife Resources Commission does
not have the authority to regulate the

taking of striped bass in joint fishing waters as defined in G.S. 113-321. The Wildlife Resources Commission would have authority to regulate the taking of striped bass in joint waters designated under G.S. 113-132(e); however, no joint waters have been designated under G.S. 113-132(e).

In order to determine whether the Wildlife Resources Commission has authority to adopt a regulation concerning a size limit on striped bass in joint fishing waters, it is necessary to analyze the history of the regulation of joint fishing waters.

Prior to January 1, 1966, the regulation of fishing was divided between the Wildlife Resources Commission and the Department of Conservation and Development. The Wildlife Resources Commission exercised jurisdiction over inland fishing waters and the Department of Conservation and Development exercised jurisdiction over commercial fishing waters. There were two basic exceptions to this split in jurisdiction, one of which gave the Wildlife Resources Commission jurisdiction over inland game fish wherever they were found and one of which gave the Wildlife Resources Commission authority to require inland fishing licenses in certain commercial fishing waters.

In the 1965 Session of the General Assembly a comprehensive revision of fishing laws was enacted which became effective January 1, 1966. Session Laws 1965, C. 957. This revision changed the name of "commercial fishing waters" to "coastal fishing waters" and established a new category of waters called "joint fishing waters." G.S. 113-321.

In addition, G.S. 113-132(e) provided a mechanism whereby both the Wildlife Resources Commission and the Department of Conservation and Development (now the Department of Natural and Economic Resources) could jointly regulate in certain waters agreed upon by the agencies to be joint waters.

G.S. 113-321 was intended by the legislature to preserve the status quo with respect to Wildlife Resources Commission regulation in

what was previously called commercial fishing waters. This provision was designed to allow the Wildlife Resources Commission to continue licensing and to continue regulation of inland game fish in certain waters that had previously been commercial waters and which were to be called coastal waters after the 1965 revisions. In our opinion G.S. 113-321 was not intended by the legislature to denominate joint waters which would make both inland and coastal fishing laws applicable under G.S. 113-132(e). This intent is apparent from the wording of G.S. 113-321 and from the result that would occur if G.S. 113-321 were to be interpreted as automatically making both coastal and inland regulations applicable to such waters.

G.S. 113-321 states that "the Wildlife Resources Commission may *continue* to enforce license requirements and *applicable* inland fishing laws and regulations in such waters." (Emphasis supplied) This clearly shows that the legislative intent in creating joint waters under G.S. 113-321 was to preserve the status quo with respect to certain regulations which the Wildlife Resources Commission has traditionally enforced in joint waters. In addition, it is clear that the legislature did *not* intend to automatically make the Wildlife Resources Commission regulations effective in joint waters as designated under G.S. 113-321, because to do so would have immediately caused a patent conflict in almost all of the regulations of the Wildlife Resources Commission and the Department of Conservation and Development by making the regulations of both applicable in joint waters. Prior to 1965, and since that time, only the Department of Conservation and Development and its successors have exercised authority in this area.

For the foregoing reasons, it appears that the unescapable legislative intent in the enactment of G.S. 113-132 and G.S. 113-321 was to preserve the status quo by enacting G.S. 113-321 and to provide for a means of joint regulation by the enactment of G.S. 113-132(e). G.S. 113-132(e) was intended to be activated only by an agreement between the Wildlife Resources Commission and the Department of Natural and Economic Resources.

At its October meeting, the Wildlife Resources Commission passed a resolution which adopted North Carolina Fisheries Regulation A verbatim as a regulation of the Wildlife Resources Commission.

applicable in joint waters. The question now presented is whether the Wildlife Resources Commission is legally authorized to unilaterally adopt and enforce such a regulation.

Joint fishing waters as defined in North Carolina Inland Fishing Regulations 1-76 are joint fishing waters as defined in G.S. 113-321. There has been no agreement between the Wildlife Resources Commission and the Department of Conservation and Development or its successor the Department of Natural and Economic Resources defining joint waters since the enactment of G.S. 113-132(e). Therefore, the provision of G.S. 113-132(e) which allows joint regulation of inland waters has not been activated, and the Wildlife Resources Commission's action of October 20, 1975, with respect to the regulation of size limits on striped bass in joint waters is not authorized by statute.

Such a regulation could be legally authorized upon the proper designation of joint waters under G.S. 113-132(e) by the Wildlife Resources Commission and the Department of Natural and Economic Resources.

Rufus L. Edmisten, Attorney General
William A. Raney, Jr.
Assistant Attorney General

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November 1975

Subject: Courts; Juveniles; Mental Health; Authority of District Court Judge to Commit a Juvenile to a State Mental Hospital Under G.S. 7A-286

Requested by: Honorable Linwood T. Peoples
District Court Judge
9th Judicial District

Questions: (1) Does a State District Court Judge have the authority to commit a juvenile to John Umstead Hospital under the provisions of G.S. 7A-286?

(2) If so, is there a requirement for rehearing not later than 90 days thereafter within the provisions of Article 5A, Chapter 122?

Conclusions:

(1) No.

(2) In view of conclusion number 1, the rehearing prescribed by Article 5A, Chapter 122 is not required.

The involuntary commitment procedures to be used in North Carolina for placing mentally ill individuals in State mental hospitals are set forth in Article 5A, Chapter 122 of the General Statutes. These statutes are very explicit in prescribing the procedural and evidentiary rules and the rights of the individuals concerned. They permit no deviation from the due process requirements mandated therein.

A similar question has previously been addressed in 43 N.C.A. 163 (1973), involving the predecessor to the present G.S. 7A-286(6). The basic rationale behind the then existent statute was described in the next to the last paragraph of that opinion.

The 1975 General Assembly amended G.S. 7A-286(6) to read as follows:

"If the court believes, or if there is evidence presented to the effect that the child is mentally ill or is mentally retarded the court shall refer the child to the area mental health director or local mental health director for appropriate action. *In no case will a child be committed directly to a State hospital or mental retardation center.* The area mental health director or local mental health director shall be responsible for arranging an interdisciplinary evaluation of the child and mobilizing resources to meet the child's needs. If institutionalization is determined to be the best service for the child, then admission shall be with the voluntary consent of the parent or guardian; provided, that the consent of the parent or guardian shall not

be required in those cases wherein the alternative to admission to a State hospital or mental retardation center is the commitment of the child to a juvenile corrections facility." (Emphasis supplied.)

The emphasized sentence is new terminology in the present statute. In its present form, the literal language of this statute proscribes a district court judge from committing a juvenile to a State mental hospital when acting under the authority vested in him by G.S. 7A-286(6). This was clearly the intent of the General Assembly and is patently applicable to actions taken either before or after an interdisciplinary evaluation of the juvenile is conducted. Significantly, the ensuing sentences of this subsection speak only in terms of the "admission" of a child; notably absent is any terminology authorizing or even suggesting the authority to "commit" to a mental hospital.

The final sentence in G.S. 7A-286(6) was patently intended to prevent the lack of consent of a parent or guardian from requiring the placement of the child in a juvenile corrections facility where the obvious proper course is admission to a mental hospital. Nothing in this sentence can be reasonably construed to overcome the specific prohibition against direct commitment of the child to a State hospital by the juvenile judge.

It should be noted, as indicated in the prior opinion of the Attorney General cited previously, that in instances wherein involuntary commitment to a State mental hospital is appropriate, the provisions of Article 5A, Chapter 122, are available for use.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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5 December 1975

Subject: Courts; Imposition of Fines

Requested by: The Honorable Clifton E. Johnson
District Court Judge
26th Judicial District

Question:

Can the court as a condition of suspending sentence require that a defendant convicted of driving under the influence or an alcoholic related offense pay an assessment for the use and benefit of an alcohol driver education school whether or not the defendant is required to attend said school?

Conclusion:

No, under Article IX, Section 7 of the North Carolina Constitution, fines collected by a county for breach of the penal laws of this State belong to the county and must be used exclusively for maintaining free public schools.

Under G.S. 15-197 the judge of any court enjoying criminal jurisdiction may suspend sentence upon prescribed conditions providing that defendant has given express or implied consent to such judgment. See *State v. Cole*, 241 N.C. 576, 86 SE 2d 20 (1955); *State v. Young*, 21 N.C. App. 316, 204 SE 2d 185 (1974).

A list of possible conditions appears in G.S. 15-199 which states that *any other* condition may also be imposed. Monetary payment conditions appear in subsections (8), (9) and (10) and these read:

"(8) Deposit with the clerk of the court from his earnings a savings account in such installments and at such intervals as the court may direct; and the clerk shall thereupon deposit such funds in the savings account in an institution whose accounts are insured by an agency of the federal government and the principal plus interest earned shall be paid to the probationer upon his discharge or earlier upon order of the court;

(9) Pay a fine in one or several sums as directed by the court;

(10) Make reparation or restitution to the aggrieved party for the damage or loss caused by his offense, in an amount to be determined by the court."

the remuneration specified in (10) to the aggrieved party has been approved judicially in *State v. Gallimore*, 6 N.C. App. 608, 170 SE 2d 573 (1969) and the Court of Appeals has also approved a condition requiring reimbursement of the State for the cost of court-appointed counsel. *State v. Foust*, 13 N.C. App. 382, 185 SE 2d 718 (1972).

Article IX, Section 7 of the North Carolina Constitution limits, however, the kinds of fines which may be imposed. This section provides:

"County school fund. All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."

This particular section was the basis of a recent decision of the Court of Appeals, *State v. Walker*, No. 7418SC943, _____ N.C. App. _____, SE 2d (1975) in which the facts are analagous to those before. In that case, a defendant was convicted and his judgment suspended on the condition that he pay a sum to the Finance Officer of the City of Greensboro to be used by the Vice Squad of the Greensboro Police Department. Citing the above constitutional section, the Court of Appeals held that the Court did not have authority to direct the sum to that person or department.

It is the opinion of this Office that *State v. Walker, supra*, is controlling precedent for the proposed fine here. Because the fine imposed on the defendant would be directed to the special school for alcoholic driver education, this obligation of payment contravenes the mandate of Article IX, Section 7, that the monies be held for the counties for use by the public schools. We assume that the restitution allowed in G.S. 15-199(10) is a limited exception based upon historical judicial approval.

Rufus L. Edmisten, Attorney General
Elizabeth R. Cochran
Associate Attorney

10 December 1975

Subject: Constitutional Law; Courts; Appointment of Magistrates; Determination by Chief District Judge and Administrative Office of the Courts; Article IV, Section 10, N. C. Constitution; G.S. 7A-171(c) G.S. 7A-133.

Requested by: The Honorable Liston B. Ramsey
N. C. General Assembly

Question: Where the General Assembly has established a minimum and maximum number of magistrates for a county, are the provisions of G.S. 7A-171(c) constitutional which authorize the chief district court judge, with approval of the Administrative Office of the Courts, to determine if additional magistrates are needed, not to exceed the maximum set by the General Assembly?

Conclusion: This Office does not ordinarily pass upon the constitutionality of acts of the General Assembly in view of the presumption favor of constitutionality established by the Courts, and a statute will not be declared unconstitutional unless such a conclusion is so clear that no reasonable doubt can arise. In the absence of judicial decisions construing G.S. 7A-171, the presumption of constitutionality is controlling.

Article IV, Section 10 of the North Carolina Constitution provides in pertinent part: "The number of district judges and magistrates shall, from time to time, be determined by the General Assembly

Pursuant to this mandate, the General Assembly enacted G.S. 7A-133 which provides that each county shall have the number

f magistrates set out in the table, and the General Assembly has determined a minimum and maximum number of magistrates for each county.

G.S. 7A-171(b) requires the minimum number to be appointed, and G.S. 7A-171(c) provides for additional magistrates to be appointed when the chief district judge, with the approval of the Administrative Officer of the Courts, certifies that the minimum number is insufficient for the efficient administration of justice and that a specified additional number, not to exceed the maximum set by the General Assembly, is required."

Thus, the General Assembly has determined both the minimum and maximum number of magistrates, and has delegated to the two officials the authority to determine when additional magistrates may be required for the efficient administration of justice.

The question arises as to whether G.S. 7A-171(c) is a delegation of legislative authority without providing sufficient standards for a guide. It seems that the two officials do not legislate as to the number of magistrates a county may have, but simply determine when the minimum number established by the General Assembly is insufficient for the efficient administration of justice. Strong's N. C. Index, 2d, Constitutional Law, Sec. 7.

The presumption is that an act of the Legislature is constitutional and the courts will not strike it down if such legislation can be upheld on any reasonable ground. *Ramsey v. Veterans Commission*, 61 NC 645; Strong's N. C. Index 2d, Statutes, Sec. 4.

In the absence of a decision by our Court construing the statutes in question, this Office indulges the presumption in favor of constitutionality.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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10 December 1975

Subject: Municipal Housing Authorities; Public Building Contracts; Separate Specifications for Certain Classes of Work

Requested by: Mr. R. Charles Waters
Attorney for Hendersonville
Housing Authority

Question: Are the provisions of G.S. 143-128, which require separate specification and separate contract for certain classes of work in the construction or alteration of public buildings, applicable to Municipal Housing Authorities?

Conclusion: This Office recommends that the provisions of G.S. 143-128 be followed by Municipal Housing Authorities as there is no clear exception of the applicability of G.S. 143-128 to Housing Authorities.

In a letter of November 5, 1975, it was indicated the architect responsible for the overall coordination of construction of a Hendersonville Housing Authority project was of the opinion that for economic reasons, a single contract would be more advantageous than the separate contracts required by G.S. 143-128 for certain classes of work. The Hendersonville Housing Authority requested an opinion as to whether or not the authority must comply with G.S. 143-128 with regard to separate contracts.

G.S. 143-128 provides that where the entire cost of the work for the construction or alteration of a building will exceed \$20,000, separate specifications must be prepared for certain classes of work including (1) heating, ventilation and air conditioning; (2) plumbing and gas fittings; (3) electrical installation; and (4) refrigeration or cold storage. It further provides that specifications must be so drawn as to permit separate and independent bidding for each of the classes of work enumerated and that separate contracts shall be awarded for the respect of work specified to responsible and reliable persons or firms regularly engaged in their respective lines of work.

Article 1 of Chapter 157 provides for Municipal Housing Authorities. G.S. 157-9 grants certain powers to Public Housing Authorities which are enumerated in part the following powers: "...to prepare, carry out and operate housing projects; *to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof*;...to purchase, lease,...acquire...any property...; to acquire by eminent domain any real property...; to sell, exchange, transfer...any property real or personal...;to own, hold, clear and improve property". G.S. 157-9 further provides that "*No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the Legislature shall specifically so state....*" (Emphasis supplied.)

The general rule in the construction of statutes is that exceptions in statutes should be strictly but reasonably construed, and all doubts should be resolved in favor of the general provision rather than the exception. 73 AM. Jur. 2d, Statutes 313. The exemption of Public Housing Authorities to "*provisions with respect to the acquisition, operation or disposition of property by other public bodies*" does not clearly include the construction or repair of buildings. The Legislature was specific in granting powers to the Housing Authority to provide for the "*construction, reconstruction, improvement, alteration or repair of any housing project or part hereof*", as well as for the acquisition, lease, sale, exchange or transfer of any property and the operation of housing projects. The exemption relates only to three of the authorities specifically granted that is the "*acquisition, operation or disposition of property*" and the exemption does not specify the construction and repair of buildings. Had the Legislature intended to exclude the application of the provisions of G.S. 143-128 from Housing Authorities, then it could have been as specific or clear in that exemption as it was in relation to other specific grants of power and the specific exemptions relating to them.

Article 8 of Chapter 129 provides for public building contracts. G.S. 143-128 provides for separate specifications and contracts for certain classes of work in the construction or alteration of buildings. G.S. 143-129 provides for the competitive bidding procedure for contracts. The applicability to the Housing Authority of both G.S. 143-128 and G.S. 143-129 appears to be the same. No cases

have been found involving the applicability of G.S. 143-128 to Public Housing Authorities and only one case applying G.S. 143-129 to Housing Authorities has been found. In the case of *Construction Company v. Housing Authority*, 1 N. C. App. 181, the question was not presented as an issue. The Court of Appeals assumed that G.S. 143-129 was applicable. The court's reference at page 187 is quoted as follows:

"Defendant Housing Authority contends that G.S. 143-129 is explicit that once the award is made there is a binding contract. In the case before us, the contract itself altered the effect of this statute. The trial court found that the contract documents prepared by the defendant Housing Authority went beyond the requirements of the statute and imposed additional conditions of award."

It can be forceably argued that the exemption to statutes to public bodies relating to the "acquisition, operation or disposition of property" includes within that definition the construction or alteration of buildings. However, the consequences of a determination of the Housing Authority not to comply with Article 8 of Chapter 143, including the competitive bidding requirements of G.S. 143-129 should be considered. In the event G.S. 143-129 is not complied with and the subsequent contract is contested in court, if the court determined that the statute is applicable, then the contracts entered into without complying with the competitive bidding requirements would be void. *Raynor v. Louisburg*, 220 N. C. 348. The provisions of G.S. 143-128 are mandatory. If G.S. 143-128 were determined by the court to be applicable to Public Housing Authorities, the same results also could possibly follow. The Public Housing Authority proceeds at its own risk if the decision is made not to comply with the provisions of G.S. 143-128 and G.S. 143-129. Therefore, in view of the ambiguity and possible consequences of failure to comply with Article 8 of Chapter 143, this Office recommends that Municipal Housing Authorities comply with the provisions of these statutes. It is further recommended that the General Assembly clarify the applicability of G.S. 143-128 and G.S. 143-129 to Public Housing Authorities.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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10 December 1975

Subject: State Departments, Institutions and
Agencies; Department of Administration,
Capital Building Authority, Advance
Planning Contracts; State Office Building
Number 3

Requested by: Senator I. C. Crawford, Chairman
Legislative Commission on Governmental
Operations
N. C. General Assembly

- Questions:
- (1) Is approval of the Capital Building Authority required for an advance planning contract for a capital improvement project for which the General Assembly has not made an appropriation?
 - (2) Is the contract executed on November 5, 1973, on behalf of the North Carolina Department of Administration and Holloway-Reeves, Architects, a binding obligation on the State of North Carolina?
 - (3) Is the contract executed on October 29, 1975, on behalf of the North Carolina Department of Administration and Middleton, Wilkerson and McMillan a binding obligation on the State of North Carolina?
 - (4) What liability would the State incur if it now terminated the Middleton contract?

(5) What would be the legal effect of a refusal by Holloway-Reeves, Architects, to act as consultants to Middleton?

(6) Is there any basis for seeking an injunction against implementation of the Middleton contract?

Conclusions:

(1) No.

(2) Yes.

(3) Yes.

(4) Services to date of termination plus some terminal expense.

(5) Holloway-Reeves refusal to act as consultants would have no legal effect.

(6) No.

As to Conclusion (1), G.S. 129-42(1), which sets forth the powers and duties of the Capital Building Commission, provides:

"To select and employ architects, engineers, and other consultants in accordance with established State policy to plan and supervise the construction of buildings and other capital improvement projects in accordance with plans developed by the North Carolina Capital Planning Commission *for those projects for which the North Carolina General Assembly may make appropriations*, and all other agencies which may be brought under this Article or which may come under this Article by choice." (Emphasis supplied.)

It was enacted by Chapter 994, Session Laws of 1967. As a general rule, statutes speak prospectively from the date of their enactment.

The Authority was transferred to the Department of Administration by G.S. 143A-86. (Chapter 864, Session Laws of 1971)

The statutory provision involved has not been the subject of judicial interpretation. It contains an obvious limitation to "...those projects for which the North Carolina General Assembly may make appropriations...."

By its own terms, it therefore does not apply to an advance planning project for which the General Assembly has made no specific appropriation.

In fact, the 1967 General Assembly which created the Authority recognized a distinction between specific capital improvement appropriations and advance planning. In the Capital Improvement Appropriation Act (Chapter 1108, Session Laws of 1967) the Assembly, after making specific capital improvement project appropriations in Section 4 appropriated the sum of \$500,000 for "Advance Planning for Institutional Facilities". In Section 11, it designated this money as the "Capital Improvement Advance Planning Fund" and provided "The fund shall be used to provide for advance planning of those proposed projects which, upon application of state agencies, are found acceptable by the Governor and the Advisory Budget Commission. Section 11 did not require any action by the Capital Building Authority and clearly placed 'Management of the fund, including disbursements, receipt and deposit of repayments and other related transactions' in the Department of Administration.

Very little, if any, long range advance planning for capital improvements could be accomplished if General Assembly appropriations for specific projects were necessary prior to such planning.

As to Conclusion (2), while G.S. 129-42(1) authorizes the Capital Building Authority to "employ" architects, that Authority, at least since January, 1972, has not executed contracts in its own name employing architects. It has had no specific appropriations in its own name for that purpose. See Capital Improvement Appropriations Acts for the years 1971 (Chapter 983), 1973 (Chapter 523), 1973, Second Session 1974 (Chapter 1202), 1975 (Chapter 874).

In January, 1972, the Department of Administration published the Fourth Edition of its *Property Control and Construction Manual* with preface by "Carroll L. Mann, Jr., State Property Control and Construction Officer," stating as its purpose "to outline the policies of the Department of Administration in regard to "...design...of buildings, structures and other capital improvements...."

The subject of "Advance Physical Planning" is treated on page 10 thereof. State agencies are instructed to "...make application to the Department of Administration, the Property Control and Construction Division, for submission to the Advisory Budget Commission for approval...upon approval by the Governor and Advisory Budget Commission, advance planning may be started." "Long range planning for institutional development is encouraged with assistance from the Department of Administration."

It is apparent from successive sections of the Manual that Advance Physical Planning is generally intended to precede requests for specific Capital Improvement Appropriations.

The Holloway-Reeves contract is expressly labeled "Advance Planning Only, No Construction Funds Available." Except for Article 18, it follows in all material respects DA-P-110, (Revised July, 1970), Department of Administration "Standard Form of Agreement Between Owner and Architect or Engineer" printed in the aforesaid Manual at pages 48-58. It is executed by the "Owner-State of North Carolina through the Department of Administration by Carroll L. Mann, Jr."

Article 18 "Supplement Agreement" provides "the scope of the work will end with the completion of the Design Development Phase unless extended by the Owner". Of the five "Phases" included in the standard contract, this language limits this particular contract to the "Schematic Design Phase" and the "Design Development Phase" which require the architect to formulate statements of "Probable Construction Cost" and precede the "Construction Document Phase" in which "working drawings and specifications setting forth in detail and prescribing the work to be done and the materials, workmanship, finishes and equipment required" are prepared.

The procedures set forth in the Department's Manual were substantially followed. The General Assembly made application to the Department for advance planning.

See Legislative Services Commission Minutes of August 24, September 21 and October 19, 1973. The Advisory Budget Commission, Governor Holshouser present and presiding, approved the advance planning. See Advisory Budget Commission minutes of October 25, 1973.

Funds for this advance planning did not come from the Capital Improvement Advance Planning Fund. They came instead from net proceeds from rentals of parking spaces (dispositions of interests in real property) by the Department of Administration which are governed by G.S. 146-30 which provides in pertinent part that they are "to be used for such specific capital improvement projects or other purposes as are approved by the Director of the Budget and the Advisory Budget Commission.

Standard contract with Holloway-Reeves was executed under date of November 5, 1973, by Mr. Mann on behalf of the State.

As above noted, advance planning is generally designed to precede request for specific capital improvement appropriations. G.S. 143-341(3)(b) authorizes the Department:

"To prepare preliminary studies and cost estimates and otherwise to assist all agencies in the preparation of requests for appropriations for the construction and renovation of all State buildings."

Therefore, the Department possessed statutory authority to engage in this advance planning. The Advisory Budget Commission approved the project. The contract was in standard form and executed on behalf of the State by the public official who customarily executed such contracts on behalf of the Department.

We conclude that the Holloway-Reeves contract is a binding obligation on the State of North Carolina.

As to Conclusion (3), the General Assembly in the Capital Improvements Appropriation Act of 1974 (Chapter 1202, Session

Laws of 1974) appropriated \$8,000,000 for design and construction of State Office Building Number 3. The firm of Middleton, Wilkerson and McMillan was selected as architects by the Capital Building Authority on October 22, 1975. See Capital Building Authority minutes of October 22, 1975 (As yet unapproved). The contract dated October 29, 1975, was in standard form and executed on behalf of the State by the public official who customarily executed such contracts on behalf of the Department.

We conclude that the Middleton Contract, although it in part duplicates work previously contracted for with the firm of Holloway-Reeves, is a binding obligation on the State of North Carolina.

As to Conclusion (4), Article 12 of the contract provides that in the case of abandonment or suspension of the work, the architect "is to be paid for the service rendered prior to written notice from the Owner, together with any terminal expense resulting from abandonment or suspension". Section III A.4 dealing with Schematic Design Phase of the "Planning Procedures" attached to the contract requires the Architect to secure "written approval" of the Owner before proceeding with the next phase.

Article 13 of the contract provides for payment of 15% of the basic fee upon termination of the Schematic Design Phase. If the project is reactivated utilizing plans and specifications prepared by the architect, additional liability may result. Article 12. Presumably Middleton has not yet prepared plans and specifications which might cause additional liability.

As to Conclusion (5), Holloway-Reeves is not specified by name in the Middleton contract. Article 18 in pertinent part provides

"This contract is executed in accordance with the provisions of Chapter 129, Article 7 of the General Statutes and with the understanding that the Designer will employ a consultant, to be mutually agreed upon by the Owner and the Designer, for the office layout of the space (approx. 75,000 s.f.) to be occupied by the General Assembly and as approved by the Legislative Services Commission."

Therefore, the refusal of Holloway-Reeves to act as consultants to Middleton would have no legal effect if the Department and Middleton were able to mutually agree upon any consultant.

As to Conclusion (6), injunction does not lie against the exercise of discretionary authority by public officials so long as they act in good faith and in accordance with law and their actions are not "so unreasonable and arbitrary as to amount to an abuse of discretion". *Sykes v. Belk*, 278 NC 106 (1971).

Rufus L. Edmisten, Attorney General
T. Buie Costen
Special Deputy Attorney General

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10 December 1975

Subject: Motor Vehicles; Enforcement of Mechanics
and Storage Liens; G.S. 44A-4(b)

Requested by: The Honorable George T. Griffin
Clerk of Superior Court
Cumberland County

Question: Does the Clerk of Superior Court have
jurisdiction to conduct hearings pursuant
to G.S. 44A-4(b)?

Conclusion: No.

G.S. 44A-4(b) reads as follows:

"(b) Notice and Hearing. - (1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall give notice to the Department of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Department a fee of two dollars (\$2.00). The Department of Motor Vehicles shall issue notice by registered or certified mail, return receipt

requested, to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a *judicial hearing* at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Department by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Department that a hearing is desired and the Department shall notify lienor. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Department that a hearing is desired by the return of such form to the Department. Failure of the recipient to notify the Department within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted, the Department shall notify the lienor, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the Department shall transfer title to the property pursuant to such sale. If the Department is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the Department will transfer title only pursuant to the order of a *court of competent jurisdiction*." (Emphasis supplied.)

The office of Clerk of Superior Court is a constitutional office (*Re Baker*, 210 NC 617) and the clerks of superior courts are cour

of very limited jurisdiction having only such jurisdiction as is given by statute. (*Pruden v. Keener*, 262 NC 212).

G.S. 44A-4(b), *supra*, gives reference first to a "judicial hearing" and secondly to an order of a court of competent jurisdiction. Though the clerk of superior court is a court of very limited jurisdiction, the term *judicial* is generally accepted as belonging to the office of judge as judicial authority.

Since we find nothing in the statutes to specifically grant to the clerks of superior courts jurisdiction to hear or determine matters involving enforcement of liens on motor vehicles as set forth in G.S. 44A-4(b), we conclude that the terms "judicial hearing" and "court of competent jurisdiction" appearing in G.S. 44A-4(b) refer to the District Court Division of the General Court of Justice, unless limited by the amount in controversy, thereby placing jurisdiction in the Superior Court Division.

From our search, we find that the clerk of superior court is charged with the filing of laborers' and materialmen's liens, however, find no mention of any duty or jurisdiction on the part of the Clerk of Superior Court as to possessory liens; i.e., mechanics and storage liens, nor does the wording of G.S. 44A-4(b) place jurisdiction in the clerk relative to the enforcement of such liens as a special proceeding. To the contrary, G.S. 44A-4(a) states in part:

"The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property *and pays the amount of the lien asserted into the clerk of the court in which such action is pending or posts bond for double such amount, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party.*" (Emphasis supplied.)

The wording of this portion of the statute when construed in *pari materia* with subsection (b) thereof supports the placing of jurisdiction in trial divisions of the General Court of Justice.

NOTE: Though the intent of the General Assembly by its enactment of G.S. 44A-4(b) was to place jurisdiction in the General Court of Justice beginning with the small claims court, such intent was of little avail due to the restrictions of 7A-218 in placing venue in the county wherein the defendant resides and 7A-217 requiring personal service of process in small claims actions, thereby requiring such actions to be brought in the district court or superior court division based on the amount of the claim.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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10 December 1975

Subject: Municipalities; Streets and Highways;
Temporary Closing of Streets

Requested by: Mr. Henry W. Underhill, Jr.
City Attorney
City of Charlotte

Question: May a municipality close a street temporarily for a specified time for the purpose of opening a "mini-mall" and evaluating the subsequent effect on both traffic and the general neighborhood?

Conclusion: Yes, however it would be appropriate to first establish the meaning of the condition in the deed conveying the property to the city and to determine the rights of the affected parties by declaratory judgment.

The City of Charlotte seeks to close a portion of a city street for the purpose of creating a "mini-mall" and to assess the effect on local traffic and the general neighborhood. The street was deeded

to the city in fee simple "upon the express condition that the City of Charlotte shall perpetually maintain said streets, boulevards and sewerage system in at least as good plight and condition as they are now." While in North Carolina it is possible to create a defeasible fee simple by using the proper terminology, this language has generally been held to create a fee simple burdened with a trust or charge to maintain the condition. See *Maddox v. State of North Carolina*, 280 N.C. 471 (1972).

The city seeks to close the street temporarily under North Carolina G.S. 160A-296 which provides: "A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that the authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes, but is not limited to: ...(4) The power to close any street or alley either permanently or temporarily;"

Further, North Carolina G.S. 160A-300 provides: "A city may by ordinance prohibit, regulate, divert, control, and limit pedestrian and vehicular traffic upon the public streets, sidewalks, alleys, and bridges of the city."

From these provisions, it is apparent that a city may temporarily close a street to establish a "mini-mall". However, the condition in the deed conveying the street to the City of Charlotte is subject to judicial interpretation. That, coupled with the fact, that under North Carolina G.S. 1-253 et seq., entitled Declaratory Judgments, any person (or devisee) affected by a statute on municipal ordinance may obtain a declaration of his rights, leads this Office to the conclusion that a declaratory judgment would best settle the issue as to the rights of the parties in respect to the proposed temporary closing.

Rufus L. Edmisten, Attorney General
Henry Burgwyn
Associate Attorney

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10 December 1975

Subject: Public Officers and Employees; State
Officers and Employees; Travel
Allowances; Amount of Travel
Reimbursement for Transportation by
Privately Owned Automobile

Requested by: The Honorable Donald L. Smith
Superior Court Judge

Question: What is the amount of travel
reimbursement required by law for State
officers and employees when privately
owned automobiles are used in pursuance
of official State business?

Conclusion: State officers and employees are entitled
to be reimbursed at a rate of fifteen cents
(15¢) per mile traveled when privatel
owned automobiles are used in pursuance
of official State business, regardless of the
number of miles traveled.

N. C. General Statute 138-6 provides *inter alia*:

"Travel on official business by the officers and
employees of State departments, institutions and
agencies which operate from funds deposited with the
State Treasurer shall be reimbursed at the following
rates:

- (1) For transportation by privately owned
automobiles, fifteen cents (15¢) per mile of travel
and the actual cost of tolls paid...."

The rate of reimbursement provided is unequivocal and unqualified
The intent of the General Assembly is clear and cannot be
superceded by policy of any State department or agency; therefore
State officers and employees are entitled to be reimbursed at a rate
of fifteen cents (15¢) per mile traveled when privately owne

automobiles are used in pursuance of official State business, regardless of the number of miles traveled.

Rufus L. Edmisten, Attorney General
William H. Guy
Associate Attorney

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11 December 1975

Subject: Apprehension and Confinement of Military
Deserters in Local Jails

Requested by: Chief N. W. Quick
Chief of Police
Laurinburg

Question: May military deserters be apprehended by
civil officers of the State of North Carolina
and confined in a local jail?

Conclusion: Military deserters may be apprehended by
civil officers of the State of North Carolina
and confined in local jails.

The apprehension of military deserters by civilian officers is
authorized by 10 U.S.C. 808:

"Any civil officer having authority to apprehend
offenders under the laws of the United States or of
a State, Territory, Commonwealth, or Possession, or
the District of Columbia may summarily apprehend
a deserter from the armed forces and deliver him into
the custody of those forces."

Under this provision, it is neither unreasonable nor unlawful for
a State police officer to arrest and confine a miliary deserter upon
probable cause that he is absent without leave. *Myers v. United
States*, 415 F. 2d 318 (10th Cir. 1969).

The General Assembly of North Carolina has made provisions for federal prisoners to be housed in North Carolina jails:

"When a prisoner is delivered to the keeper of any jail by the authority of the United States, such keeper shall receive the prisoner, and commit him accordingly...." N.C.G.S. 162-34.

It is not imperative that a prisoner be convicted of a State crime in a State court before commitment to a local jail. *Sutton v. Williams*, 199 N.C. 546, 155 S.E. 160 (1930).

Furthermore, the procedure for confining military deserters in local jails does not have to comply with the commitment procedure established by Article 25 of General Statute Chapter 15A, the new Criminal Procedure Act. In an article for the *Wake Forest Law Review*, L. Poindexter Watts, one of the consultant-draftsmen of the Criminal Code Commission which proposed the new Criminal Procedure Act, made the following observation:

"The caption of the section describes its scope: 'Commitment to detention facility pending trial.' The section deals with the commitment of defendants and material witnesses pending trial, but does not purport to cover any additional situation. The other cases in which a person may lawfully be incarcerated would apparently continue to be covered by the applicable statute or case law." Watts, *The Pretrial Criminal Procedure Act: The Subchapter on Custody*, 10 *Wake Forest Law Review*, 417, 441 (1974).

Rufus L. Edmisten, Attorney General
Jack Cozort
Associate Attorney

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11 December 1975

Subject: Air Pollution Control; Air Quality Program;
Effect of N.C.G.S. 143-215.107(f)

Requested by: Mr. Ronald L. Lindsay
Enforcement Officer
Department of Natural and
Economic Resources

Question: Does N.C.G.S. 143-215.107(f) prohibit the Environmental Management Commission (EMC) from adopting air quality rules, regulations and procedures covering matters on which there are no corresponding Environmental Protection Agency (EPA) regulations, in (a) areas in which EPA has no authority to act, and (b) areas in which EPA has authority, but has not acted?

Conclusion: N.C.G.S. 143-215.107(f) does not prohibit the EMC from adopting air quality rules, regulations and procedures covering matters on which there are no corresponding EPA regulations.

N.C.G.S. 143-215.107(f) reads as follows:

"In adopting air quality policies, rules, regulations and procedures, the Environmental Management Commission or any other State or local regulatory body shall be guided by the same standards, definitions, considerations and criteria set forth, from time to time, in federal law, rules or regulations for the guidance of federal, state or local agencies administering the Federal Clean Air Program.

It is the intent of the General Assembly that the air quality rules, regulations and procedures promulgated by the Environmental Management Commission or any other State or local regulatory body under the General Statutes of North Carolina shall be no more restrictive than those adopted by the United States Environmental Protection Agency."

A primary principle of statutory construction is that the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. *In Re McLean Trucking Company*, 281 NC 242, 188 SE 2d 452 (1972). In the first paragraph, the EMC is directed to "be guided by the same standards, definitions, considerations and criteria *set forth*" (emphasis supplied) in federal law. This language is used to suggest a source to which the EMC can look in formulating its policies, rules, regulations and procedures in the complex area of air pollution. By using the word "guided," the Legislature is indicating that the EMC would be led in the right direction by consulting federal law, rules and regulations.

The second paragraph expresses the Legislative intent that air quality rules, regulations and procedures "shall be no more restrictive than those *adopted*" (emphasis supplied) by EPA. The plain meaning of this restriction on EMC authority is evident; where EPA has adopted a rule, regulation or procedure and has, thereby, indicated its opinion on the adequacy of a particular method of control, the EMC cannot adopt one which is more restrictive. The language is clear and unambiguous, and it does not follow from this restriction that the EMC is also prohibited from adopting rules and regulations covering matters on which EPA has no adopted regulation, and thus no established position. This would be true not only when EPA has no authority to act, but also when it has authority but has not exercised it. If there is no adopted EPA regulation on a given matter, the EMC is free to adopt regulations it deems necessary to protect, preserve, and enhance our air resources. N.C.G.S. 143B-282.

A prohibitory construction, besides being in contradiction of the plain language of the section, would circumvent this State's compliance with the Clean Air Act, 42 U.S.C. § 1857, et seq, which places the primary responsibility for controlling air pollution with the State and local governments. 42 U.S.C. § 1857(a)3. In light of that mandate, there are many areas in which EPA has not and will not act. A construction of N.C.G.S. 143-215.107(f) which would prohibit the EMC from adopting rules, regulations and procedures when there is no corresponding EPA regulation would completely frustrate the purposes of federal and State legislation concerning air pollution control. In the absence of a clear indication that this was contemplated, the Legislature should not be presumed to have intended such a result.

Rufus L. Edmisten, Attorney General
Daniel C. Oakley
Associate Attorney

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11 December 1975

Subject: Criminal Law and Procedure; Bail;
Authority of Probation Officer to Set Bail
for Probationer Without Order from
Judicial Officer

Requested by: Mr. James P. Smith
Senior Administrative Assistant
Department of Correction

Question: When a probationer residing in this State
is arrested for violating the conditions of
his probation by a law enforcement officer
without a warrant but with a written
request from the probation officer which
meets the formal requirements of
G.S. 15-200, may the officer in charge of
the probationer take sufficient justified bail
without consulting with or receiving an
order from the local magistrate?

Conclusion: When a probationer is arrested for violating
the conditions of his probation,
G.S. 15-200 authorizes his probation
officer to take bail for the probationer's
appearance at a hearing without consulting
with or receiving any order from a
magistrate or other judicial officer, when
the Court issuing the order of arrest has
failed to set bond in the order.

The 1974 Session of the 1973 North Carolina General Assembly
enacted Chapter 1286 of the 1973 Session Laws, the Criminal
Procedure Act, now codified as Chapter 15A of the General Statutes

of North Carolina. Chapter 1286, 1973 Session Laws, also amended several provisions of Chapter 15 of the General Statutes, likewise dealing with criminal procedure. The enactment of Chapter 1286 came pursuant to legislative proposals for pretrial criminal procedure presented to the General Assembly by the Criminal Code Commission, which was organized in 1970 to prepare revisions of substantive and procedural criminal law. Billings, *Pretrial Criminal Procedure Act: Scope and Objectives*, 10 Wake Forest L. Rev. 353 (1974).

Article 26 of Chapter 15A lists the new statutory provisions authorizing bail for criminal defendants, during the pretrial period and after conviction in the superior court. See G.S. 15A-534 and 15A-536. According to G.S. 15A-532, judicial officials may determine conditions for release of persons brought before them, in accordance with Article 26. Thus, it would seem that only judicial officials have the authorization to impose conditions of release, including bail, during the pretrial period and after conviction in the superior court. However, Article 26 has no provisions for several types of persons who might be held in North Carolina jails, including probation violators. G.S. 15-200, which was not amended by Chapter 1286 of the 1973 Session Laws, provides that a person under probation or a suspended sentence arrested for a violation of conditions:

"...shall be allowed to give bond pending a hearing before the judge of the court, and the court issuing the order of arrest shall in said order, fix the amount of the appearance bond, or if an appearance bond should not be fixed by the court, the officer having the defendant in charge shall take sufficient justified bail for the defendant's appearance at said hearing and the bond shall be returnable at such time and place as shall be designated by the probation officer."

Thus, it appears that Article 26 of Chapter 15A limits the power to fix bail to judicial officials; but G.S. 15A-200 provides that probation officers may fix bail in cases of probation violators. Article 26 of Chapter 15A cannot be read to apply to probation violators. In an article for the Wake Forest Law Review, L. Poindexter Watts, one of the consultant-draftsmen of the Criminal Code Commission

which proposed the new Criminal Procedure Act, made the following observation:

"Article 26 in terms applies only to criminal defendants. Of the two sections containing release procedures, G.S. §15A-534 concerns 'pretrial release' of a 'defendant'; and §15A-536 deals with bail for a 'defendant whose guilt has been established in the superior court' during the sentencing or appeal procedures." Watts, *The Pretrial Criminal Procedure Act: The Subchapter on Custody*, 10 Wake Forest L. Rev. 417, 449 (1974).

The General Assembly has established separate provisions for fixing bail in the case of criminal defendants, under Article 26 of New Chapter 15A; and for probation violators, under the previously enacted G.S. 15-200. The two enactments are not irreconcilable, i.e., one provides for criminal defendants and the other for probation violators, and it is the duty of the court to give effect to both. See *Duke Power Company v. Clayton*, 274 N.C. 505, 164 S.E. 2d 289 (1968).

Article 26 of Chapter 15A has not repealed G.S. 15-200 by implication. Speaking for the Supreme Court of North Carolina in *D. & W. Inc. v. Charlotte*, 268 N.C. 577, 151 S.E. 2d 241 (1966), supp. op. 268 N.C. 720, 152 S.E. 2d 199 (1966), Justice Sharp wrote the following:

"Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supercede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject (citation omitted)." 268 N.C. at 590.

Although bail for criminal defendants under Chapter 15A must be set by a judicial official, G.S. 15-200 authorizes probation officers to set bail for probation violators.

Rufus L. Edmisten, Attorney General
Jack Cozort
Associate Attorney

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15 December 1975

Subject: Licenses and Licensing; Plumbing and Heating Contractors; Resolution of Board Concerning Waste Lines and Water Connections in Mobile Home Parks

Requested by: The Honorable W. G. Smith
N. C. General Assembly

Question: Are the licensing requirements of Article 2, Chapter 87 for Plumbing Contractors applicable to a property owner who installs pipe from an existing well to a mobile home connection point and sewage lines from a mobile home connection point to an existing septic tank facility?

Conclusion: No.

The facts presented indicate that the State Board of Examiners of Plumbing and Heating Contractors adopted a resolution prohibiting the owner of mobile home rental property to install water pipe extending from an existing well to a mobile home connection point, and also to prevent the installation of sewer lines from a mobile home connection point to an existing septic tank or municipal sewer system. The resolution purports to be adopted under the authority of G.S. 87-21, which provides for the making of rules and regulations to carry out the Act. The question presented is: Does the Board have the authority to prohibit these connections from being made by unlicensed plumbers?

G.S. 87-21(c) provides as follows:

"The provisions of this Article shall apply to all persons, firms, or corporations who engage in, or

attempt to engage in, the *business of plumbing* or heating contracting, or any combination thereof as defined in this Article. The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing or heating." (Emphasis supplied.)

G.S. 87-21(a) defines "plumbing" and "engaged in the business of plumbing" as follows:

"(1) The word 'plumbing' is hereby defined to be the *system* of pipes, fixtures, apparatus and appurtenances, *installed upon the premises*, or *in a building*, to supply water thereto and to convey sewage or other waste therefrom. (Emphasis supplied.)

* * *

(5) Any person, firm or corporation, who for a valuable consideration, installs, alters or restores, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or heating group number three, or any combination thereof, as defined in this Article, shall be deemed and held to be *engaged in the business of plumbing* or heating contracting." (Emphasis supplied.)

The statutory definition contained in G.S. 87-21(a)(1) and (5) of "engaging in the plumbing business" extends only to those contractors who contract to install or restore entire plumbing systems or to make alterations thereof. *State v. Mitchell*, 217 N.C. 244. A newly purchased mobile home has a complete water and waste system built into it when it is constructed by the manufacturer. A mobile home park has an existing water and waste system set up to provide these necessities prior to going into the business of renting space for the occupancy of mobile homes. Having these systems in existence, all that remains to be done is to make the unsophisticated connections between the two systems. Such a connection is clearly not an alteration of a plumbing system as to come within the statutory definition of "engaging in the business of plumbing". *State v. Ingle*, 214 N.C. 276. Therefore, it is the opinion of this Office that the State Board of Examiners of Plumbing

and Heating Contractors have exceeded their authority by declaring that the individuals who connect these waste and water systems in mobile home parks are engaging in the business of plumbing and heating contracting and that the license requirements are applicable.

Rufus L. Edmisten, Attorney General
James E. Magner
Assistant Attorney General

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15 December 1975

Subject: Municipalities; Bicycle and Bikeway Act of 1974; Powell Bill Funds

Requested by: Mr. William F. Caddell, Jr.
Assistant Secretary for Planning
North Carolina Department of
Transportation

Question: May cities and towns use the gasoline tax funds allocated to them under the provisions of G.S. 136-41.1, commonly referred to as Powell Bill Funds, for the accomplishment of the Bicycle and Bikeway Act of 1974?

Conclusion: No. Powell Bill Funds are restricted to the purposes enumerated under G.S. 136-41.3 and the expenditure for a bikeway system is not a purpose enumerated thereunder.

G.S. 136-41.3 provides that Powell Bill funds, "...shall be expended by said cities and towns only for the purpose of maintaining, repairing, constructing, reconstructing or widening of *any street or public thoroughfare* including bridges, drainage, curb and gutter, and other necessary appurtenances within the corporate limits of the municipality or for meeting the municipality's proportionate share of assessments levied for such purposes." (Emphasis supplied.) It is the opinion of this Office that this provision restricts the use

of such funds to street purposes, and that the expenditure for bikeway purposes is not within the purview of the statute.

Since the statute makes reference to a "public thoroughfare" as well as a "street", this would appear to be, at first glance, a reasonable basis for asserting that a bikeway is a public thoroughfare within the purview of G.S. 136-41.3. However, the paramount rule of statutory construction is to determine, from an overall view of the statute, the intention of the Legislature in promulgating the law under scrutiny. In *D & W, Inc. v. Charlotte*, 268 NC 577 (1966) Chief Justice Sharp, quoting from *State v. Partlow*, 91 NC 550, 552 (1884) stated:

"Its meaning in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. But the meaning must be ascertained from the statute itself, and the means and signs to which, as appears upon its face, it has reference." (Emphasis supplied.) 268 NC at page 581.

Only once is the term "public thoroughfare" used in the Powell Bill Act. In the title of the Act, Chapter 260 of the 1951 Session Laws, and throughout the body of the Act, reference is continuously made to "streets". The title and preamble in part are set out as follows:

"An Act to provide for the maintenance of city *streets* constituting parts of the State Highway System by the State Highway and Public Works Commission and to appropriate funds from the Highway Fund for the partial maintenance of other city *streets* and to set forth a public policy for the construction and maintenance of all *streets* in the cities and towns."

It is the declared policy of the State:

"That cost of the construction, reconstruction and maintenance of all other *streets* in the cities and towns of the State, shall be equalized, between the cities, towns, and the State, as may be determined by the General Assembly. The construction and maintenance of such *streets* shall remain under the jurisdiction of the cities and towns." 1951 Session Laws, Chapter 260, pages 216-217. (Emphasis supplied.)

When the title, the preamble and the statute as a whole are considered, it is apparent that the use of the word "thoroughfare" as used by the General Assembly is synonymous with the word "street" and that the Legislature intended to limit Powell Bill Funds to the construction, repair and maintenance of streets.

Article 4A of Chapter 136 of the General Statutes (G.S. 136-71.6 through G.S. 136-71.12) provides for the Bicycle and Bikeway Act of 1974. G.S. 136-71.12 provides as follows:

"The General Assembly hereby authorizes the Department to include needed funds for the program in its annual budgets for fiscal years after June 30, 1975, subject to the approval of the General Assembly.

The Department is authorized to spend any federal, State, local or private funds available to the Department and designated for the accomplishment of this Article. *Cities and towns may use any funds available.*" (Emphasis supplied.)

It is the opinion of this Office that G.S. 136-71.12 in providing that "Cities and towns may use any funds available", does not authorize the use of Powell Bill funds for the Purpose of the Bikeway Act. The only logical interpretation of the statement is that cities and towns may use any funds available for bikeway purposes, if those funds are not restricted to use for some other purpose. Powell Bill Funds are not available, because they have been restricted to other uses.

The Senate Journal for the 1973 General Assembly, 1974 Session at page 492, contains the following concerning Senate Bill 1372 which was enacted as the Bicycle and Bikeway Act of 1974:

"S.B. 1372, ...Without objection, the remarks of Senator McNeill Smith in his motion that the Senate concur in the House Amendment are ordered spread upon the Journal as follows: 'I move that we concur in the House amendment to S.B. 1372. In explaining the amendment to the House, Representative Stewart stated its purpose to permit cities and towns, at their option, to use any funds, including Powell Bill Funds, for bikeway projects. On the same explanation here in the Senate, I move we concur in the House amendment and that these remarks be included in the Senate Journal as a part of the legislative history of the Act.'" Senate Journal 1974 Session (at p. 492).

A statute is an act of the Legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. *State v. Partlow*, 91 NC 550, 552. As for the comments quoted from the Senate Journal, this Office is of the opinion that the statements cannot amend the expressed provisions of G.S. 136-41.3, which restrict the use of Powell Bill Funds, nor can they give a different legislative intent to the provisions of G.S. 136-71.12 from that expressed therein.

Rufus L. Edmisten, Attorney General
Wilton E. Ragland, Jr.
Associate Attorney General

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23 December 1975

Subject: Courts; District Attorneys; Clerks, Court
Actions; Support Actions; Trial at Criminal
Term

Requested by: The Honorable Lee J. Greer
 District Attorney
 Whiteville

Questions: (1) May an action under the Uniform
 Reciprocal Enforcement of Support Act be
 tried at a criminal term of Court?

 (2) May a Special County Attorney
 prosecute actions under the Uniform
 Reciprocal Enforcement of Support Act in
 lieu of the District Attorney?

 (3) Do the duties specified under G.S.
 52A-12 devolve upon the Clerk or the
 District Attorney?

Conclusions: (1) An action under the Uniform
 Reciprocal Enforcement of Support Act
 may not be tried at a criminal term without
 consent of the defendant.

 (2) Yes.

 (3) The duties specified by G.S. 52A-12
 devolve upon the Clerk, not the District
 Attorney.

G.S. 52A-9 provides that jurisdiction of all proceedings under the Uniform Reciprocal Enforcement of Support Act is vested in any court of record in this State having jurisdiction to determine liability for persons for the support of dependents in any criminal proceeding. "Prosecuting Attorney" is defined by G.S. 52A-3(8) as the District Attorney in the appropriate place who has a duty to enforce criminal laws relating to the failure to provide for the support of any person. G.S. 52A-10.1 provides that it shall be the duty of the official who prosecutes criminal actions for the State in the court acquiring jurisdiction to appear on behalf of the obligee in such support proceedings. The action is instituted by the filing of complaint and issuance of summons as in actions for alimony without divorce. See G.S. 52A-10. Thus, while the court having

criminal jurisdiction also has jurisdiction of support actions under Chapter 52A of the General Statutes, such actions are civil in nature. G.S. 7A-49.2(a) specifies that at criminal sessions of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of the parties. It has been held that a contested divorce action conducted over defendant's protest and in disregard of his motion for a continuance for trial at a civil session is a nullity. See *Branch v. Branch*, 282 N.C. 133, 191 S.E. 2d 671 (1972). Upon the foregoing, this Office is of the opinion that an action instituted under the provisions of Chapter 52A of the General Statutes may not be tried at a criminal session of court absent consent by the defendant.

With respect to Question (2), G.S. 52A-10.3 provides in pertinent part as follows:

"In counties where the services of a special county attorney are available for social services matters as set out in G.S. 108-20 through G.S. 108-22, such special county attorney, instead of the prosecuting attorney, shall represent the obligee, the county or the plaintiff in any proceeding under this Chapter when the county has a right to invoke the provisions of this Chapter under G.S. 52A-8.1."

G.S. 108-22(a) (2) provides that the Special County Attorney shall represent the county, the plaintiff, or the obligee in all proceedings brought under the Uniform Reciprocal Enforcement of Support Act. Without question, the Special County Attorney is authorized, in lieu of the District Attorney, to prosecute such actions where the county has furnished support to an obligee. We are of the opinion that the Special County Attorney upon agreement with the District Attorney may prosecute any other action under Chapter 52A in lieu of the District Attorney.

As to Question (3), G.S. 52A-12 provides that the court in an action in which this State is acting as a responding state shall (1) docket the cause, (2) notify the prosecuting attorney as described in G.S. 52A-10.1, (3) set a time and place for a hearing, and (4) take such action as is necessary in accordance with the laws of this State to secure jurisdiction. It is noted that the statute specifies that the

court shall perform these duties, one of which is notifying the official who prosecutes criminal actions for the State as specified in G.S. 52A-10.1 which is the District Attorney or the Special County Attorney. This Office is of the opinion that the duties are ministerial in nature and devolve upon the Clerk of Court in which the action is pending and not the District Attorney.

Rufus L. Edmisten, Attorney General
Parks H. Icenhour
Assistant Attorney General

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23 December 1975

Subject: Mental Health; Voluntary Admission;
Hospitals; Authority of General Hospital to
Retain Mental Patient for 72 Hours after
Request for Release

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services

Question: May an applicant who has been voluntarily
admitted to a general hospital for
psychiatric services as treatment for a
mental illness be held in the hospital for
a period of 72 hours subsequent to his
written request for release?

Conclusion: Yes.

Article 4, Chapter 122 N.C.G.S. provides the procedures for voluntary admission to a North Carolina treatment facility. In his written application for admission, an individual seeking to be voluntarily admitted to a treatment facility must acknowledge that he may be held by the facility for a period of 72 hours subsequent to his written request for release. G.S. 122-56.3. This question has arisen since a general hospital is not included in the definition of a "treatment facility" as applicable to Article 4. G.S. 122-56.2(b).

Article 10, Chapter 122 N.C.G.S. deals with private hospitals for the mentally disordered and requires licensing thereof by the State of North Carolina. G.S. 122-72.1 provides that the term "private hospital", as used therein, includes psychiatric services in general hospitals licensed by the Department of Human Resources. Finally, G.S. 122-81.1 states:

"§ 122-81.1. *Voluntary admission to private hospital.*— Any person believing himself to be mentally ill or inebriate, or threatened with mental illness, may voluntarily admit himself to a private hospital as defined in G.S. 122-72 in accordance with the procedure specified in Article 4 of this Chapter; provided the private hospital is willing to accept such person for care and treatment."

From the correlation of all of these statutory provisions, it is apparent that an individual who has been voluntarily admitted to a private hospital under the provisions of Article 4, Chapter 122, falls within the ambit of G.S. 122-56.3.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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28 December 1975

Subject: Motor Vehicles; License Tax; Authority to Levy

Requested by: Gillam & Gillam
Attorneys for Town of Windsor

Questions: (1) Under the provisions of G.S. 20-97 are the license tax and the requirement that license plates be displayed applicable to vehicles which become "resident" in the town *after* January 1 of any year?

(2) What considerations determine when a vehicle is "resident" in a municipality as the term is used in G.S. 20-97(a)?

(3) If a license plate is once issued for a motor vehicle during a particular year by a municipality, is the owner liable for another one dollar (\$1.00) license tax during the same year if the vehicle becomes "resident" in another municipality?

Conclusions:

(1) Yes.

(2) The considerations determinative of when a vehicle is "resident" are the residence of the owner, the "residence" of the vehicle, whether the owner is an individual person or other than an individual person, type of vehicle and use.

(3) Yes.

G.S. 20-97(a) reads as follows:

"§ 20-97. *Taxes compensatory; no additional tax.*— (a) All taxes levied under the provisions of this Article are intended as *compensatory taxes for the use and privileges of the public highways of this State*, and shall be paid by the Commissioner to the State Treasurer, to be credited by him to the State highway fund; *and no county or municipality shall levy any license or privilege tax upon the use of any motor vehicle licensed by the State of North Carolina, except that cities and towns may levy not more than one dollar (\$1.00) per year upon any such vehicle resident therein: Provided, however, that cities and towns may levy, in addition to the one dollar (\$1.00) per year, herein set forth, a sum not to exceed fifteen dollars (\$15.00) per year upon each vehicle operated in such city or town as a taxicab.*" (Emphasis supplied.)

As to Conclusion (1), the provisions of G.S. 20-97(a) create a use or privilege tax on vehicles by cities and towns for the use of their streets and attaches upon a vehicle becoming "resident" within a city or town.

As to Conclusion (2), we admittedly find it difficult to apply the word "resident" to a motor vehicle. However, from the wording of G.S. 20-97(a), *supra*, we conclude that the word "resident" when so used indicates a fixed and permanent situs for the time being as contradistinguished from a mere temporary locality of existence. Therefore, a vehicle is "resident" within a city or town when its owner or operator is a resident thereof and it is garaged therein, if it leaves therefrom and returns thereto in normal day to day operation or if used in common carrier or for hire operations and is based therein. Though a vehicle may be present in a city or town for extended periods of time, such as those of a parent used by a child while attending college, it would not become "resident" therein as contemplated by G.S. 20-97(a).

As to Conclusion (3), the tax under G.S. 20-97(a) is a use or privilege tax which attaches or becomes due upon the happening of the event specified by the statute. In the case of vehicles, the event giving rise to the tax occurs when the vehicle becomes "resident" within a city or town. Therefore, if a vehicle is "resident" within a city or town as of January 1, the one dollar (\$1.00) use or privilege tax provided in G.S. 20-97(a) would attach. However, if the same vehicle should later in the same year be moved and become "resident" in a different city or town, the city or town to which moved could also assess the tax. It should be noted, however, that not more than a one dollar (\$1.00) tax may be collected by a city or town per year per vehicle and if the tax is not apportioned by the city or town, it would be necessary to issue city tags on a staggered system; i.e., if a tag is issued for a one dollar (\$1.00) fee, it must be for a year. The expense and confusion resulting from the issuance of less than a full year tag may well make the issuance thereof unwise if not economically unfeasible.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

I N D E X T O A T T O R N E Y
G E N E R A L O P I N I O N S

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8 January 1976

Subject: Public Records; Application for Licensure
Received by the Board of Examiners for
Speech and Language Pathologists and
Audiologists

Requested by: Mariana Newton, Ph.D., Chairman
Board of Examiners for Speech and
Language Pathologists and Audiologists

Question: Are applications for licensure received by
the Board of Examiners for Speech and
Language Pathologists and information
received by the Board during the licensure
procedure subject to public inspection and
examination under G.S. 132-6?

Conclusion: Yes.

An application for licensure and other information obtained during the licensure procedure are documents received by the Board of Examiners for Speech and Language Pathologists and Audiologists, an agency of the State of North Carolina, pursuant to authority conferred in Article 22 of Chapter 90 of the General Statutes for the purpose of licensing individuals as speech and language pathologists or audiologists. Therefore, unless other provisions of law express a contrary legislative intent, such applications for licensure and other information are "public records" as defined by G.S. 132-1 and are subject to inspection and examination under G.S. 132-6.

Article 22 of Chapter 90 does not expressly exempt such applications for licensure and other information from the definition of "public record." On the contrary, G.S. 90-292 expresses the legislative intent that the Article was enacted to safeguard the public health, to help assure the availability of qualified speech and language pathologists and audiologists, and to "...protect the public from being misled by incompetent, unscrupulous, and unauthorized persons and from unprofessional conduct on the part of qualified speech and language pathologists and audiologists." The application

for licensure and other information are an integral part of the licensing procedure established to protect the public. It would be anomalous to hold that such application and other information, submitted for the protection of the public, is foreclosed from inspection by the public. The provisions of G.S. 93B-2, which require the filing of annual reports by occupational licensing boards, and G.S. 93B-3, which requires occupational licensing boards to inform requesting persons of the licensed status of any individual, are deemed to be additional duties imposed on such boards and not restrictions on access to records which are otherwise open to public inspection and examination. Therefore, it is the opinion of this Office that the application for licensure and other information described above are subject to public inspection and examination under G.S. 132-6.

Rufus L. Edmisten, Attorney General
Robert R. Reilly
Assistant Attorney General

- - -

8 January 1976

Subject: Corporations; Corporate Name; Corporate Purpose

Requested by: Mr. Jack Styles
Corporations Attorney
Department of the Secretary of State

Questions: (1) Does the use of the word "design" in the name of a corporation organized pursuant to Chapter 55 of the General Statutes constitute the practice of architecture in violation of G.S. 83-1 and G.S. 83-12?

(2) Would the use of the phrase "Designs Unlimited" in the corporate name "Designs Unlimited of North Carolina, Inc." violate G.S. 55-12(b) if the only corporate

purpose is to engage in the business of the manufacture and distribution of dried flower arrangements, household decorations and similar items?

- Conclusions:
- (1) No.
 - (2) Yes.

G.S. 83-1(3) defines the practice of architecture as:

"...rendering or offering to render service by consultations, investigations, evaluations, preliminary studies, plans, specifications, contract documents and a coordination of all factors concerning the design and supervision of construction of buildings or any other service in connection with the designing or supervision of construction of buildings located within the boundaries of the State, regardless of whether such services are performed in connection with one or all of these duties, or whether they are performed in person or as the directing head of an office or organization performing them."

G.S. 83-12 makes it unlawful for any person to "...use any words, letters, figures, title, sign, card, advertisement, or other device to indicate that such person practices or offers to practice architecture..." without a valid certificate of admission to practice architecture issued by the North Carolina Board of Architecture.

The word "design" is defined in *Ballentine's Law Dictionary* (3rd Ed. 1969) as "a purpose, usually combined with a plan, of action; an intent or aim...a sketch, plan, or pattern.... See architectural design; formal design." It is clear from the definitions of "architecture" and "design" that the use of the latter in the name of a corporation organized pursuant to Chapter 55 of the General Statutes does not constitute the unlawful practice of architecture in contravention of G.S. 83-12. The word "design" has a meaning separate and distinct from "architectural design", and the public is not misled into believing that a corporation that uses the word "design" in its name is engaged in the practice of architecture.

G.S. 55-12(b) prohibits a corporation from using a name "which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its charter." When the word "design" is used without limitation in a corporate name, the public could surmise that the corporation is engaged in formulating and developing all types and varieties of designs. Since the corporate charter of "Designs Unlimited of North Carolina, Inc." limits the corporate purpose to the manufacture and distribution of dried flower arrangements, household decorations and similar items, the Secretary of State should not approve the use of the phrase "Designs Unlimited" in the corporate name because the corporate charter does not and cannot authorize the formulation or development of all designs.

Rufus L. Edmisten, Attorney General
John M. Silverstein
Special Deputy Attorney General

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8 January 1976

Subject: State Departments, Institutions and Agencies; Municipalities; Zoning

Requested by: The Honorable James C. Green
Speaker, House of Representatives
The Honorable John T. Henley
President Pro Tempore, Senate
General Assembly of North Carolina

Questions: (1) May the City of Raleigh designate as a historic district any portion to the area delineated by statute for acquisition for the expansion of state governmental facilities?

(2) Would the restrictions imposed upon use of properties within a historic district apply to properties owned by the State?

Conclusions: (1) Yes.

(2) No.

As to Conclusion (1), G.S. 146-22.1(3) delineates an area to be acquired by the State for future expansion of governmental facilities. The State has acquired some of the properties within that area. Others remain in private ownership. Parts 3A and 3B of Article 19 of Chapter 160A of the General Statutes authorize municipalities to create historic districts and impose restrictions upon the use of properties within such districts. It would thus appear that the City of Raleigh has the authority to create a historic district within the area involved. The effect of such action upon State-owned property is discussed under Conclusion (2).

As to Conclusion (2), it is a rule of statutory interpretation that "General Statutes do not bind the State unless the State is expressly mentioned therein". 7 *Strong*, NC Index 2d, Statutes § 5, p 70; *Yancey v. Highway Commission*, 222 NC 106 (1942).

While the *general* zoning authority of municipalities contained in Part 3 of Article 19 of Chapter 160A extends to State property by reason of G.S. 160A-392, that statute expressly refers to the "provisions of this Part".

Historic district zoning is authorized by Parts 3A and 3B of Article 19 of Chapter 160A. Neither Part contains any provision making the State subject to municipal authority in this regard.

Therefore, if the City of Raleigh were to create a historic district within the area delineated by G.S. 146-22.1(3), properties owned by the State would not be subject to the restrictions usually attendant to such action.

Rufus L. Edmisten, Attorney General
T. Buie Costen
Special Deputy Attorney General

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14 January 1976

Subject: Motor Vehicles; Chauffeur's Licenses; City
Employees and Firemen

Requested by: Mr. W. A. Watts
Charlotte Deputy City Attorney

Questions: (1) Does G.S. 20-7 require that firemen who are required to drive fire trucks and other firefighting equipment as a primary duty be classified as a chauffeur and require that such a driver obtain a chauffeur's license in order to drive firefighting equipment for the City?

(2) Does G.S. 20-7 require city employees driving trash collection trucks, city vehicles, including trucks, mower-type vehicles and other specialized equipment, to obtain a chauffeur's license?

Conclusions: (1) A fireman classified as "driver" should obtain a chauffeur's license.

(2) A city employee employed for the purpose of operating a motor vehicle, not exempt pursuant to G.S. 20-8, should obtain a chauffeur's license.

G.S. 20-7(a) requires in part:

"§ 20-7. *Operators' and chauffeurs' licenses; expiration; examinations; fees.*—(a) Except as otherwise provided in G.S. 20-8, no person shall act as or operate a motor vehicle over any highway in this State as a chauffeur unless such person has first been licensed as a chauffeur by the Division under the provisions of this Article. Except as otherwise provided in G.S. 20-8, no person shall operate a motor vehicle over any highway in this State unless such person has first been licensed as an operator or a chauffeur by the Division under the provisions of this Article...."

G.S. 20-4.01(3) defines chauffeur as follows:

"(3) Chauffeur.--Every person who is employed by another for the principal purpose of driving a motor vehicle and every person who drives any motor vehicle when in use for the transportation of persons or property for compensation and the driver, other than the owner of a private hauler, of any property-hauling vehicle or combination of vehicles licensed for more than 30,000 pounds gross weight and the driver of any passenger-carrying vehicle of over nine-passenger capacity except the driver of a church bus, farm bus, school bus, or an activity bus for a nonprofit organization when such bus is being operated for a nonprofit purpose, who holds a valid operator's license. Those under 20 years of age must be certified and licensed to operate a North Carolina school bus."

Those persons working for a city or town whose primary duty is that of operating a motor vehicle, not excluded either by the provisions of G.S. 20-8 or within the definition of chauffeur, would be required to hold a valid chauffeur's license issued pursuant to G.S. 20-7.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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14 January 1976

Subject: Motor Vehicles; Operator's and Chauffeur's
License; Change of Address

Requested by: Mr. Edward L. Powell
Commissioner of Motor Vehicles

Question: Does G.S. 20-7.1 require a licensee to have
his current address shown on his operator's
or chauffeur's license?

Conclusion: Yes. G.S. 20-14 provides for issuance of a substitute license upon payment of \$1.00

G.S. 20-7.1 reads as follows:

"§ 20-7.1. *Notification of change of address.*— Whenever the holder of a license issued under the provisions of G.S. 20-7 changes his or her address as shown on such license, he or she shall notify the Division of Motor Vehicles of such change within 60 days after such address has been changed."

G.S. 20-7(n) reads as follows:

"(n) *Every operator's or chauffeur's license issued by the Division* shall bear thereon the distinguishing number assigned to the licensee and color photograph of the licensee of a size approved by the Commissioner and *shall contain the name, age, residence address* and a brief description of the licensee, who, for the purpose of identification and as a condition precedent to the validity of the license, immediately upon receipt thereof, shall endorse his or her regular signature in ink upon the same in the space provided for that purpose unless a facsimile of his or her signature appears thereon; provided the requirement that a color photograph of the licensee appear on the license may be waived by the Commissioner upon satisfactory proof that the taking of such photograph violates the religious convictions of the licensee. Such license shall be carried by the licensee at all times while engaged in the operation of a motor vehicle. However, no person charged with failing to so carry such license shall be convicted, if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest." (Emphasis supplied.)

G.S. 20-7(n) and G.S. 20-7.1 are contained in Article 2 of Chapter 20. Therefore, G.S. 20-35 is applicable to these sections. G.S. 20-35 reads as follows:

"§ 20-35. *Penalties for misdemeanor.*—(a) It shall be a misdemeanor to violate any of the provisions of this Article unless such violation is by this Article or other law of this State declared to be a felony.

(b) Unless another penalty is in this Article or by the laws of this State provided, every person convicted of a misdemeanor for the violation of any provision of this Article shall be punished by a fine of not more than five hundred dollars (\$500.00) or by imprisonment for not more than six months."

G.S. 20-7.1 and G.S. 20-7(n) are parts of the same statute and relate to the same subject matter. To have any logical meaning, they must be considered in *pari materia*. G.S. 20-7(n) provides that every operator's or chauffeur's license issued by the Division of Motor Vehicles shall bear thereon...and *shall* contain the name, age, *residence address*...; G.S. 20-7.1 requires that the Division shall be notified within 60 days of a change of address and the failure to do so is subject to the provisions of G.S. 20-35 which provides that the violation of any of the provisions of Article 2 constitutes a misdemeanor punishable by a fine of not more than \$500.00 or by imprisonment for not more than six months.

Though ancillary to the true purpose of the operator's license, an operator's license is used for general identification. In fact, it is used for identification to such extent that in 1973 the General Assembly enacted G.S. 20-37.7 which provides a special identification card for non-operators. The special identification card is basically the same as an operator's license, except for color and the indication thereon that it is not an operator's license.

The General Assembly is presumed to be cognizant of the existing statutes and the presumption is in favor of the proposition that it did not do a foolish thing. Also, where two statutes deal with the same subject matter, the language of the statutes will be construed in *pari materia* and will be interpreted to avoid absurd consequences. (*Cab Company v. Charlotte*, 234 NC 572, *Person v. Garrett, Commissioner of Motor Vehicles*, 280 NC 163).

We interpret G.S. 20-7.1, when read with G.S. 20-7(n), and in light of the fact that G.S. 20-7.1 would be totally unenforceable and

of no value if the license is not corrected to show a change of address, to require that a change of address be shown on the operator's license card.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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23 January 1976

Subject: State Departments, Institutions and
Agencies; Administrative Procedure Act;
Subpoenas

Requested by: The Honorable Willis P. Whichard
Member of the Senate
N. C. General Assembly

Question: What is the proper method for an
administrative agency to serve a subpoena
in connection with a contested case hearing
under the Administrative Procedure Act,
pursuant to G.S. 150A-27?

Conclusion: An administrative agency may serve a
subpoena in connection with a contested
case hearing under the Administrative
Procedure Act, pursuant to G.S. 150A-27,
either by directing an employee of the
agency to serve it, by directing the sheriff
of the county in which the person
subpoenaed resides to serve it, or by any
method authorized in G.S. 1A-1, Rule
45(e).

G.S. 150A-27, the "Subpoena" section of the Administrative Procedure Act, provides for administrative agencies conducting contested case hearings under the Administrative Procedure Act to issue subpoenas, either upon their own motion, or upon written request. The statute does not prescribe the means by which the

subpoena should be served, and the question has arisen what method or manner of service of subpoena would be permissible.

Neither the General Statutes of North Carolina nor relevant authorities on Administrative Law provide a clear-cut answer to this question. However, a parallel situation is found in the General Statutes in the provisions for service of subpoenas in judicial proceedings. G.S. 1A-1, Rule 45(e), provides that "subpoenas may be served by the sheriff, by his deputy, by a constable, by a coroner or by any other person who is not a party." The agency may provide for service of its subpoenas by the sheriff upon payment of the required fee or by its own employees, other than those directly involved in prosecuting or deciding the contested case.

A party other than the agency should not serve subpoenas for an administrative "contested case" hearing. For an individual party to serve subpoenas would raise serious questions about due process under the Constitution of the United States and could impair the integrity of the administrative or judicial process, depending on whether the subpoena is for a judicial proceeding or administrative hearing.

However, even though the agency is technically a party, it is permissible for it to use its own employees to serve the subpoena. An administrative agency differs from an individual party in that it consists of different people and different branches performing different functions. Just as the State may use the sheriff to serve subpoenas, the solicitor to prosecute the case, and one of its own judges to decide the case, an administrative agency may call upon its employees to perform various functions required in the administrative process. See 2 Davis, *Administrative Law Treatise*, §§ 13.01-.02; *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456 (1975).

In enacting laws for the service of subpoenas of particular State agencies, the General Assembly has provided at times both for service of agency subpoenas by the sheriff's office and by employees of the agency issuing the subpoenas. G.S. 62-63 provides that Industrial Commission subpoenas are served by the sheriff's office. G.S. 90-219.24 provides that an "inspector of the Board of Mortuary Science" is authorized to serve any papers or subpoenas issued by the Board of Mortuary Science. Both methods have also

been used by other agencies which are authorized by statute to issue subpoenas, but for which there are no statutory provisions as to how the subpoena should be served.

In conclusion, an agency may serve a subpoena in any manner which does not violate the due process requirements of the United States Constitution or other provisions of law, including such recognized methods as service by the sheriff or his office or by agency employees not directly involved in or affected by the controversy and any method permitted in G.S. 1A-1, Rule 45(e), for service of subpoenas in judicial proceedings.

Rufus L. Edmisten, Attorney General
Norma S. Harrell
Associate Attorney

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23 January 1976

Subject: Mental Health; Area Mental Health
Programs; Supervisory Responsibility for
Clinical Services

Requested by: Mr. R. J. Bickel
Assistant Director for Administration
Division of Mental Health Services

Question: As used in G.S. 122-35.22, what does the
term "clinical services" include?

Conclusion: The term "clinical services" includes all
observation, diagnosis, therapy and
treatment rendered to the patients served
by an area mental health program.

Article 2C of Chapter 122 provides for the establishment of area mental health programs. Such a program "shall include, but not be limited to, programs for general mental health, mental disorder, mental retardation, alcoholism, drug dependence, and mental health education." G.S. 122-35.19. Elsewhere in Article 2C, G.S. 122-35.22 provides:

"§ 122-35.22. *Clinical services*.—All clinical services under an area mental health program shall be under the supervision of a person duly licensed to practice medicine in North Carolina."

The services rendered by an area mental health program result from multidisciplinary efforts. This factor apparently has triggered the present question.

Nowhere in Article 2C is the term "clinical services" defined. However, *Webster's Third New International Dictionary* (1964), at page 423 defines the word "clinical" as follows:

"...of, relating to, or conducted in or as if in a clinic (as a medical clinic): as a: involving or depending on direct observation of the living patient (-diagnosis) (-examination) b: observable by clinical inspection (-tuberculosis) c: based on clinical observation (-picture) (-treatment) d: applying objective or standardized methods (as interviews and personality or intelligence tests) to the description, evaluation and modification of human behavior (-psychology)..."

It must be assumed that this general definition articulates the intent of the General Assembly at the time of enacting G.S. 122-35.22.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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23 January 1976

Subject: Public Officers and Employees; Coroner;
Authority of General Assembly to Abolish
the Office of Coroner; No Authority for
County to pay Coroner after Office
Abolished

Requested by: Mr. W. H. Taylor
Franklin County Attorney

Question: Where a coroner has been elected for a term of four years and the office of coroner has been abolished by a special act of the General Assembly, is the county obligated to pay the coroner for the full term for which he was elected?

Conclusion: No.

The office of coroner is a statutory office and may be abolished by the General Assembly at any time and upon ratification of the act abolishing the office, both the duties and the emoluments of the office terminate.

Thus, Franklin County has no authority to pay the coroner for the full term for which he was elected and since Chapter 333, Session Laws of 1975 became effective on May 19, 1975, the coroner could not be paid after said date.

The office of coroner is no longer a constitutional office and is a statutory office created by the General Assembly as provided in Chapter 152 of the General Statutes. Public office is not a property right and there can be no title to public office, therefore the Legislature may abolish an office altogether which has been created by the General Assembly and which is purely statutory. Upon the ratification of an act abolishing an elective office, both the duties and the emoluments of the office terminate. *Efird v. Board of Commrs.*, 217 NC 691; *Penny v. Salmon*, 217 NC 276; *Brown v. Board of Commrs.*, 223 NC 744.

As stated in *Brown v. Commissioners*, *supra*, after the office has been abolished, the person elected thereto has no claim for salary accruing after the date the office was abolished and payment of salary after the effective date would amount to a gratuity and thus would be in violation of the constitutional mandate that no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service.

Therefore, we conclude that the office of coroner of Franklin County was abolished on May 19, 1975, and that the person is not entitled to any compensation after said date; and the county has no authority to pay the ex-coroner for any services rendered after May 19, 1975.

Rufus L. Edmisten, Attorney General
James F. Bullock
Deputy Attorney General

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28 January 1976

Subject: Arrest and Bail; Venue

Requested by: The Honorable Ralph J. Scott
Assistant Solicitor
17th District

Questions: (1) May a person arrested for a traffic violation in Stokes County be lawfully carried before a magistrate in Surry County for the issuance of a warrant and there held in jail pending the posting of bond?

(2) What is the duty of an arresting officer in the case of a drunken driver:

(a) when no magistrate is promptly available;

(b) when the arrested person is so drunk as to clearly present a hazard to himself and others if released; and

(c) how long, if at all, may the arresting officer hold the accused under these circumstances without incurring criminal or civil penalties or liability?

Conclusions: (1) A person arrested for a traffic violation in Stokes County may be lawfully

carried before a magistrate in Surry County for the issuance of a warrant and held in jail in Surry County pending the posting of bond, provided the jail facility will accept the person arrested and the arresting officer has jurisdiction.

(2) (a) The duty of an arresting officer in the case of a drunken driver when no magistrate is promptly available is to carry the person before a judicial official or official with authority to issue warrants and set bail without necessary delay.

(b) When the arrested person is so drunk as to clearly present a hazard to himself and others if released, the officer should carry such person before a magistrate who should issue orders as to disposition.

(c) The arresting officer should carry the person arrested before a magistrate without unnecessary delay.

As to Conclusion (1), a warrant valid throughout the State may be issued by a magistrate under the provisions of G.S. 15A-304(f) (6) and pursuant to Article 10 of Chapter 153A. (G.S. 153A-211, et seq.) Jurisdictions of county and municipal levels may cooperate in establishing district confinement facilities, even though counties and cities are still authorized to maintain local confinement facilities (jails). The only real problem would appear to arise due to jail fees and the fact that the jailer in Surry County would not be required by statute to receive the person arrested pending bond without prior agreement, the arrest not being made in Surry County. G.S. 162-41.

If it be desirable or mutually convenient for the person arrested and the arresting officer to go before a magistrate in an adjoining

county due to distances involved or other legitimate causes, it would appear that arrangements should be made between the involved jurisdictions for the use of the jail facilities, if such should become necessary.

As to Conclusion (2), the duty of a law enforcement officer upon arrest without a warrant is clearly set forth in G.S. 15A-501. It is to be noted that though G.S. 15-46 and G.S. 15-47 relating to duties of officers and rights of accused were repealed by Chapter 286 of the 1973 Session Laws effective July 1, 1975, Section 27 of Chapter 1286 provided that, "All statutes which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose." G.S. 15A-501 clearly comes within the purview of this section. Justice Sharp (now Chief Justice), speaking for the Court in *State v. Hill*, 277 NC 547, said: "The statute (old 15-47) says he is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon". She also strongly indicates that the "four hour rule" (if such could be said to exist) cannot stand in the face of the "critical stage rule". If the officer does not comply with the statute, the criminal may well go free because the constable erred (*People v. Defore*, 242 NY 13, 21, 150 SE 585, 587). Also see G.S. 15A-511.

As to how long the arresting officer may hold the accused under the circumstances set out above without incurring criminal or civil penalties or liability, the question would, we think, turn on the question of good faith and due diligence. The statute, G.S. 15A-501(2), clearly states that the officer must take the person arrested before a judicial official without unnecessary delay. Unnecessary simply means not required by the circumstances of the case. Delay is defined in *Black's Law Dictionary* as "to retard; obstruct; put off; postpone; defer; hinder; interpose obstacles...." From the wording of G.S. 15A-501 and the case law relative thereto, we would urge all officers to exercise due diligence in carrying out the mandate of the statutes or be prepared to justify his actions to the satisfaction of a jury.

On the question of a person being arrested being so drunk (or appearing to be) as to clearly present a hazard to himself and others

if released, G.S. 15A-503 places a positive duty on the arresting officer where the person arrested is or becomes unconscious or is suffering from some disabling condition to make a reasonable effort to determine if the person is wearing a "medic alert" type emblem indicating possible medical problems. The odor of alcohol alone would not appear to be sufficient to offset this duty. We would urge all officers having arrested a person appearing to be highly intoxicated to forthwith take such person before a judicial officer for an order directing the future action to be taken relative to such person by the officer.

As to Conclusion (2) (c), we are unable to give an absolute answer as the facts of each individual case would be determinative of the final outcome. It is for this reason, we have hereinabove urged due diligence and good faith handling of all cases as near as possible in complete compliance with the relevant statutes.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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28 January 1976

Subject: Presidential Preference Primary Act; Article 18A, General Statutes of North Carolina Eligibility of Seventeen Year Olds Whose Eighteenth Birthday Will Be Reached Prior to the Presidential General Election in November, 1976, to Vote in the North Carolina Presidential Preference Primary Election in March, 1976

Requested by: The Honorable Patricia S. Hunt
Member, House of Representatives
N. C. General Assembly

Question: May seventeen year olds whose eighteenth birthday will be reached prior to the presidential general election in November

1976, vote in the North Carolina
Presidential Preference Primary Election in
March, 1976?

Conclusion: Yes.

North Carolina General Statute 163-59, which deals with primary elections in general and which was enacted some years prior to North Carolina's Presidential Preference Primary Act, reads in pertinent part as follows:

"Any person who will become qualified by age or residence to register and vote in the general election or regular municipal election for which the primary is held, even though not so qualified by the date of the primary, shall be entitled to register for the primary and general or regular municipal election prior to the primary and then to vote in the primary after being registered. Such person may register not earlier than 60 nor later than 21 days prior to the primary."

G.S. 163-213.3, which deals with the conduct of Presidential Preference Primary elections provides:

"The presidential preference primary election shall be conducted and canvassed by the same authority and in the same manner provided by law for the conduct and canvassing of the primary election for the office of Governor and all other offices enumerated in G.S. 163-187 and under the same provisions stipulated in G.S. 163-188. The State Board of Elections shall have authority to promulgate reasonable rules and regulations, not inconsistent with provisions contained herein, pursuant to the administration of this Article."

The General Assembly, in enacting that portion of G.S. 163-59 quoted above, said in effect that if a person would meet the age requirement to vote in the general election for which the primary is held, he could participate and vote in such primary. The reasoning here appears obvious for since such a person could vote in the general

election, he should be allowed to participate in the processes which lead to the selection of those whose names will appear on the ballot in such general election.

In 1975 the General Assembly rewrote the Presidential Primary Act and established a Presidential Preference Primary in North Carolina and in so doing stated in G.S. 163-213.3 that such presidential primary election "...shall be conducted and canvassed by the same authority and in the same manner provided by law for the conduct and canvassing of the primary election for the office of Governor and all other offices enumerated in G.S. 163-187 and under the same provisions stipulated in G.S. 163-188."

Proper statutory construction dictates that the General Assembly intended for all who qualified for the primary elections for State and local offices to be qualified to express themselves in the Presidential Preference Primary. To hold otherwise would create an inconsistency for which reasons do not appear.

Rufus L. Edmisten
Attorney General

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12 February 1976

Subject: Administrative Procedures Act
Effectiveness of Rules Adopted Prior to
February 1, 1976, but not Filed with the
Attorney General on February 1, 1976
Necessity for Rule-making Proceedings
Prior to Filing Rules Adopted and not
Filed on or Before February 1, 1976

Requested by: Mr. Samuel H. Long, III
Legal Counsel to the Governor

Questions: Where an agency subject to the
Administrative Procedures Act has not, or
or before February 1, 1976, filed with the
Attorney General's Office rules which had

been finally adopted on or before February 1, 1976:

- (a) Are such rules enforceable in the period between February 1, 1976, and the time of filing?
- (b) Is the agency required to conduct rule-making proceedings for the adoption of such rules prior to filing them?

- Conclusions:
- (a) The rules are not enforceable during the period between February 1, 1976, and the time of filing.
 - (b) The agency is not required to hold rule-making hearings for the adoption of rules which had been finally adopted prior to February 1, 1976, even though such rules are not filed on or before February 1, 1976.

G.S. 150A-59 provides in relevant part:

"Filing of Rules.—(a) Rules adopted by any agency on or after February 1, 1976, shall be filed with the Attorney General. All rules shall become effective 30 days after filing, unless the agency shall certify the existence of good cause for, and shall specify, an earlier or later effective date. The certification shall state the agency's finding and reasons. An earlier effective date shall not precede the date of filing.

* * *

(c) Rules previously in existence shall be ineffective after January 31, 1976, except that they shall immediately become effective upon filing in

accordance with the provisions of this Article."

Subsection (c) plainly provides that rules previously in existence shall not be effective after January 31, 1976, unless they are filed on or before February 1, 1976, but that they shall become effective upon filing with the Attorney General.

G.S. 150A-9 provides with respect to rule-making proceedings: "No rule hereafter adopted is valid unless adopted in substantial compliance with this Article." The key word in the provision is "hereafter." Therefore, we conclude that rules finally adopted prior to February 1, 1976, but not filed on or before February 1, 1976 become effective upon filing and that rule-making hearings are not required for their adoption. It would seem to be better practice for the person making the certification of adoption on behalf of the agency, when filing rules adopted before February 1 at a time after February 1, to include in the agency's certification of adoption a certification that the rules had, in fact, been finally adopted prior to February 1, 1976.

Rufus L. Edmisten, Attorney General
David S. Crump
Associate Attorney

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12 February 1976

Subject: University of North Carolina; Port
Authority; Elections; Public Officials
Political Activities by Members of Board of
Trustees and Board of Governors, and Port
Authority

Requested by: The Honorable James B. Hunt, Jr.
Lieutenant Governor

Questions: (1) Can a member of the UNC Board of
Governors, or a member of the UNC-CH
Board of Trustees, or a member of the
Community College Board of Trustees

serve as a treasurer, chairman, or manager of a political committee officially filed with the State Board of Elections?

(2) Can such members of such official State Boards serve as campaign managers on campaign committees at the county level for an announced political candidate?

Conclusion: So far as this Office can ascertain, the answer to each question is affirmative, and we find no provision of law which prohibits such activities.

So far as we can determine, the members of the Board of Governors, Board of Trustees of the constituent institutions, Board of Trustees of community colleges and members of the Ports Authority are not State employees, or temporary employees, subject to the Personnel Act. Therefore, G.S. 126-13(1) would not be applicable to such persons.

We find no provision in Chapters 115A, 116, 143 or 143B which would prohibit such persons from serving in any of the positions referred to in the questions. Nor do we construe the provisions of G.S. 143B-13(c) as being applicable to the members of the Board of Governors or Boards of Trustees, or members of the Ports Authority.

It would appear, therefore, that the answer to both questions is affirmative.

Rufus L. Edmisten, Attorney General
James F. Bullock
Senior Deputy Attorney General

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2 February 1976

Subject: Motor Vehicles; Fold-out Camper Trailers;
Brake Requirements

Requested by: The Honorable Donald R. Kincaid
Member of Senate
N. C. General Assembly

Question: Are fold-out camper trailers, which must be erected prior to use, subject to the provisions of G.S. 20-124(f) requiring house trailers of 1,000 pounds gross weight or more to be equipped with brakes?

Conclusion: No, fold-out camper trailers are not house trailers within the meaning of G.S. 20-124(f). However, fold-out camper trailers which exceed two tons gross weight must be equipped with brakes.

G.S. 20-124(f) provides:

"(f) Every semitrailer, or trailer, or separate vehicle, attached by a drawbar or coupling to a towing vehicle, and having a gross weight of two tons, and all house trailers of 1,000 pounds gross weight or more, shall be equipped with brakes controlled or operated by the driver of the towing vehicle, which shall conform to the specifications set forth in subsection (e) of this section and shall be of a type approved by the Commissioner.

It shall be unlawful for any person or corporation engaged in the business of selling house trailers at wholesale or retail to sell or offer for sale any house trailer which is not equipped with the brakes required by this subsection.

This subsection shall not apply to house trailers being used as dwellings, or to house trailers not intended to be used or towed on public highways and roads. This subsection shall not apply to house trailers with a manufacturer's certificate of origin dated prior to December 31, 1974."

House trailers are defined in G.S. 20-4.01(14):

"(14) House Trailer.—Any trailer or semitrailer designed and equipped to provide living or sleeping facilities and drawn by a motor vehicle."

G.S. 20-183.2, in relevant part, reads:

"§ 20-183.2. *Equipment inspection required; inspection certificate; one-way permit to move vehicle to inspection station.*—(a) Every motor vehicle, trailer, semitrailer, and pole trailer not including trailers of a gross weight of less than 4,000 pounds and house trailers, registered or required to be registered in North Carolina when operated on the streets and highways of this State must display a current approved inspection certificate at such place on the vehicle as may be designated by the Commissioner, indicating that it has been inspected in accordance with this Part. Such motor vehicle shall thereafter be inspected and display a current inspection certificate as is required by subsection (b) hereof."

We do not interpret G.S. 20-4.01(14) as including those vehicles which require erection prior to use within the meaning of the term house trailer (mobile home). The fold-out camper, though designed to be erected into a structure which can provide living and sleeping facilities, when towed upon the highway has the basic configuration of a utility trailer and as such does not, without modification or basic change, provide either living or sleeping facilities.

It should be noted that fold-out camper trailers which exceed two tons gross weight would require brakes and be subject to inspection and lighting requirements.

It is further noted that G.S. 20-124(f) provides that the sale of a house trailer in North Carolina without the brakes required therein is unlawful.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

16 February 1976

Subject: Social Services; Legal Representation for
County Board of Social Services and
County Department of Social Services
(Including Its Director and Employees)

Requested by: Dr. Renee P. Hill
Director
Division of Social Services

Questions: (1) Is the county attorney required by
law to represent the county board of social
services or the county department of social
services (including its director and
employees)?

(2) In the event that the county
commissioners choose not to appoint or
designate a special county attorney for
social service matters, pursuant to
G.S. 108-20, is the county board of social
services or the county department of social
services (including its director and
employees) liable for its (or his) own
expenses for legal counsel?

(3) What statutory obligation is imposed
on the Attorney General to represent a
county board of social services or a county
department of social services (including its
director and employees)?

Conclusions: (1) A county attorney is not required by
statute to represent the county board of
social services or the county department of
social services (including its director and
employees) in the absence of his
designation by the board of county
commissioners as special county attorney
for social service matters. See G.S. 108-20

(2) In the event that the board of county commissioners chooses not to appoint or designate a special county attorney for social service matters, the county board of social services and the county department of social services (including its director and employees) will be responsible for securing legal representation at their own expense.

(3) There is no statutory obligation imposed on the Attorney General to represent a county board of social services or a county department of social services (including its director and employees).

Under the authority of G.S. 153A-114, a board of county commissioners is mandated to appoint a county attorney "to serve at *its* pleasure and to be *its* legal advisor." (Emphasis Supplied) The county commissioners, upon the approval of the county board of social services, *may* designate the county attorney as special county attorney for social service matters or *may* appoint a licensed attorney to serve in that capacity. G.S. 108-20. Accordingly, unless the county attorney is designated by the board of county commissioners as special county attorney for social service matters, he is under no legal obligation to represent the county board of social services or the county department of social services (including its director and employees).

In the event that the appointment or designation referred to in G.S. 108-20 is not made, the county board of social services and the county department of social services (including its director and employees) will have to rely on their own resources in obtaining legal assistance. Of course, any county officer or employee may, pursuant to G.S. 153A-97, request that the county provide for his legal defense. However, it is entirely discretionary with the county whether to honor such a request.

Finally, there is no statutory obligation or authority for the Attorney General to represent a county board of social services or a county department of social services (including its director and employees).

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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17 February 1976

Subject: Social Services; Juveniles; Courts;
Pre-hearing Detention Under G.S. 7A-284
other than in Juvenile Detention Home or
Jail

Requested by: Mr. Thomas R. Odom
Attorney for Durham County
Department of Social Services

Question: When a child is taken into custody
pursuant to G.S. 7A-284 but is not held
in a juvenile detention home or jail, must
a hearing be held within five days exclusive
of or inclusive of Saturdays, Sundays and
holidays?

Conclusion: When a child taken into custody pursuant
to G.S. 7A-284 is not held in a juvenile
detention home or jail, a hearing must be
held within five days exclusive of Saturday,
Sunday, or holidays or else the child must
be released.

G.S. 7A-284 provides as follows:

"§ 7A-284. *Immediate custody of a child.*--If it
appears from a petition that a child is in danger, or
subject to such serious neglect as may endanger his
health or morals, or that the best interest of the child
requires that the court assume immediate custody of
the child prior to a hearing on the merits of the case,
the judge may enter an order directing an officer or
other authorized person to assume immediate custody

of the child. Such an order shall constitute authority to assume physical custody of the child and to take the child to such place or person as is designated in the order. The court shall conduct a hearing on the merits at the earliest practicable time within five days after assuming custody, and if such a hearing is not held within five days, the child shall be released."

This Office has previously ruled that G.S. 7A-286(3) prohibits "holding a delinquent or undisciplined child in a juvenile detention home or jail for more than five consecutive days, including Saturdays, Sundays and legal holidays, without a hearing." See 43 N.C.A.G. 37 (1973). This ruling was necessitated by the specific language of G.S. 7A-286(3), to the effect that:

"No child shall be held in any juvenile detention home or jail for more than five *calendar* days without a hearing to determine the need for continued detention under the special procedures established by this Article." (Emphasis supplied.)

In passing, it must be noted that the language quoted from G.S. 7A-286(3) refers to a hearing to determine the need for continued detention whereas G.S. 7A-284 addresses the subject of a hearing on the merits. Most important, though, is the significant absence of the word "calendar" from the provisions of G.S. 7A-284. As a result, in situations wherein the court utilizes that statute for directing the assumption of immediate custody of a juvenile but the juvenile is not held in a juvenile detention home or jail, the computation method required by Rule 6(a) of the Rules of Civil Procedure is controlling, i.e.:

"When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation."

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

19 February 1976

Subject: State Departments, Institutions and Agencies; Administrative Procedure Act
Notice of Rule-making Hearings

Requested by: Mr. Gary K. Berman
Administrative Procedures Office
Department of Human Resources

Question: When another statute requires that a public hearing with at least ten days' notice be held, prior to the adoption of any rules does the requirement of G.S. 150A-12(a) that notice of a rule-making hearing be given at least ten days before the public hearing and at least twenty days before adoption, amendment or repeal of a rule apply?

Conclusion: When another statute provides that a particular number of days' notice must be given before the adoption of any rule, that statute controls over G.S. 150A-12(a), the notice provision of the Administrative Procedure Act.

Any Commission created by the Executive Organization Act of 1971 is required to hold a public hearing with at least 10 days' notice before adopting any rules or regulations. G.S. 150A-12(a) requires that notice of a public hearing subject to the Administrative Procedure Act be given within the time prescribed by any applicable statute, or if none then at least ten days before the public hearing and at least twenty days before the adoption, amendment, or repeal of the rule. The Administrative Procedure Act clearly contemplates that a statutory requirement for notice before the adoption of a rule specifically applying to a particular agency shall take precedence over the Administrative Procedure Act. Only if there is no other statute providing a time period for notice does the notice period of the Administrative Procedure Act apply. It is not necessary for the agency to apply those parts of the time limits under the

Administrative Procedure Act for notice before the hearing and before the adoption of the rules which are not specifically paralleled by its own statute. Any Commission subject to G.S. 143B-18 is simply required to give ten days' notice before the public hearing, and it need not follow the provision of G.S. 150A-12(a) that there also be at least twenty days between notice of a hearing and the actual adoption, amendment, or repeal of a rule.

Rufus L. Edmisten, Attorney General
Norma S. Harrell
Associate Attorney

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9 February 1976

Subject: Motor Vehicles; Driver's License Records

Requested by: Mr. Fred Colquitt
Director, Drivers License Section
Department of Motor Vehicles

Question: Does G.S. 20-26 require that accidents be recorded on driver's license records?

Conclusion: No. Though any conviction upon a charge arising from an accident should appear on the record, there is no requirement that the fact of an accident be shown.

G.S. 20-26 reads, in relevant part:

" §20-26. *Records; copies furnished.*--(a) The Division shall keep a record of proceedings and orders pertaining to all operator's and chauffeur's licenses granted, refused, suspended or revoked. The Division shall keep records of convictions as defined in G.S. 20-24(c) occurring outside North Carolina only for the offenses of exceeding a stated speed limit of

55 miles per hour or more by more than 15 miles per hour, driving while license suspended or revoked, engaging willfully in speed competition, hit-and-run driving resulting in damage to property, unlawfully passing a stopped school bus, illegal transportation of intoxicating liquors, and the offenses included in G.S. 20-17."

The statute does not require that accidents be shown on operator's license records and in light of the fact that motor vehicle records may well fall within the definition of "consumer reports" under the Fair Credit Reporting Act, they must be kept within the mandate of the statute and with absolute accuracy.

Since the charges arising from an accident upon conviction are recorded on the driver's license record as is action by the Division of Motor Vehicles as a result thereof, the fact of the accident is not required nor should it be made a part of the driver's license record.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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19 February 1976

Subject: Emergency, Definition of; As Used in
G.S. 160A-288 (Law Enforcement Mutual
Assistance Agreements)

Requested by: Mr. Larry D. Jones
Legal Advisor
Department of Public Safety

Questions: (1) What does the word "emergency"
mean as it is used in G.S. 160A-288?
(2) Can an emergency be any situation
or circumstance which the "chief elected

official" determines to constitute an emergency?

(3) Would crowd control for a small town or city being visited by a high governmental official (i.e. President or Vice President) be an "emergency" situation if so declared by the Mayor or "chief elected official" of that town or city?

(4) Would crowd and traffic control for a community sponsoring a parade or fair be an "emergency" if so declared, assuming the need for extra personnel exists?

Conclusions:

(1) An emergency, as used in G.S. 160A-288, can be any set of circumstances or situations that gives rise to a problem or offenses against the public safety.

(2) No. An emergency can only be a situation or circumstance which involves the public safety, and is characterized by life or property being threatened to such an extent that extra law enforcement personnel are required in order to protect the public and bring the situation back under control.

(3) Yes. Crowd control for a small town or city being visited by a high governmental official (i.e. President or Vice President) could be considered an "emergency" and so declared by the Mayor or "chief elected official" of that town or city.

(4) Yes. Crowd and traffic control for a community sponsoring a parade or fair could be considered an "emergency" if the

need for extra police personnel exists and there had not been time for advance preparation.

"Emergency" is defined in *Black's Law Dictionary* as:

" A sudden unexpected happening; an unforeseen occurrence or condition; specifically, perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity.

A relatively permanent condition or insufficiency of service or of facilities resulting in social disturbance or distress."

"State of Emergency", as used in the Riots and Civil Disorder Article as offenses against the public safety, is defined in G.S. 14-288.1 as:

"'State of Emergency'": The condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent."

It would be extremely difficult to specify each type of "emergency" that is intended to be covered by G.S. 160A-288. Suffice it to say that any set of circumstances that gives rise to a problem falling under any of the above definitions would be "an emergency" as it is used in G.S. 160A-288.

An emergency is a situation or circumstance which involves the public safety. In most instances an emergency would be situations where life or property is threatened to such a large extent and the possibility of disaster is so immediate that extra law enforcement personnel are required in order to adequately protect the public and bring the situation back under control. The "chief elected official" should determine the gravity of the situation before

declaring an emergency. He must base his decision on the exigency of the circumstances after being fully advised of the "emergency" situation by people who are knowledgeable about it. Governmental bodies within the community, such as the city counsel, town commissioners, etc. should be made aware of the circumstances in order that they may fully understand the decision of the "chief elected official". The chief elected official should then make findings of fact which would justify the situation being declared an emergency. These findings of fact should be in written form and should be included in the request for law enforcement assistance from another community.

Crowd control for a small town or city being visited by a high governmental official (i.e. President or Vice President) could be considered an "emergency" situation and be so declared by the Mayor or chief elected official of that town or city. Findings of fact would have to be set out specifying the nature of the danger posed by the circumstances and the exigency of the situation in order to avoid an assassination attempt or other such catastrophe which would give rise to a larger emergency.

Crowd and traffic control for a community sponsoring a parade or fair could be considered "an emergency" if the crowd is expected to be so large that the existing police personnel would not be able to adequately handle it and there had not been adequate time for advance preparation. Ordinarily, a parade or fair would not be considered an emergency because it is not an unforeseen occurrence or condition. Rather, it is an event that is planned and time is allowed for precautions to be taken. However, if the precautions taken by the existing police force are not sufficient to handle the situation, and a major problem arises, the situation could then be declared an emergency by the chief elected official and a request for law enforcement assistance could then be made. Findings of fact supporting such a conclusion must be made by the chief elected official.

Your attention is also directed to G.S. 160A-282, and G.S. 160A-283 which authorizes an auxiliary police force and a joint county-city auxiliary police. This is an excellent method of furnishing additional police protection when needed, and is not dependent upon the existence of an emergency.

In addition, G.S. 166-1 through 166-12 create a Civil Defense Agency and authorize the creation of local organizations for civil defense in the political subdivisions of this State. These local agencies were created to insure the preparedness of the State and local communities to adequately deal with large scale emergencies.

Rufus L. Edmisten, Attorney General
Lawrence T. Pollard
Associate Attorney

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19 February 1976

Subject: Escheats; Credit Unions

Requested by: Mr. W. L. Cole
Administrator
Office of Credit Unions

Question: Do the present escheat statutes apply to state chartered credit unions?

Conclusion: Yes. State chartered credit unions are not exempted from the escheat statutes.

There are no provisions within Chapter 116A "Escheats and Abandoned Property" that would create an express or implied exemption for State chartered credit unions. Within Subchapter III "Credit Unions" of Chapter 54, only G.S. 54-109.60 warrants a discussion on the issue of a possible exemption for credit union accounts.

G.S. 54-109.60 reads as follows:

"§ 54-109.60. *Dormant accounts.*--(a) If a credit union member's account be without activity for a period of two years, the account may be declared dormant and 60 days subsequent to written notification to the member, which would be by statement or letter, be transferred to the reserve fund of the credit union.

(b) The member may reclaim any such sums by proper judicial proceedings commenced within 10 years after such action of the board of directors.

(c) This section does not apply to shares, deposits, accounts, dividends, interest and other sums due to or standing in the name of two or more persons unless the credit union is unable to contact any of such persons in the manner and during the period specified in subsection (a)."

The drafter of the statute may have intended that the transfer of the account to the reserve fund under the provisions of subsection (a) would constitute the final disposition of the account. In other words, it may have been intended that the account would remain in the reserve fund, subject only to a claim by the member within the 10 year period established by subsection (b). This intention is not expressed by the language of the statute. The language of the statute establishes an internal management procedure. There is no language in the statute that creates an exemption from the escheat statutes. There is no language in G.S. 54-109.60 directing that a dormant account be retained in the reserve fund for the 10 year period. Therefore, the direction of the escheat statutes in regard to the delivery of abandoned property to the Escheat Fund is applicable to the dormant accounts.

In summary, it is stated that in the absence of an exemption the escheat statutes are applicable to State chartered credit unions.

Rufus L. Edmisten, Attorney General
Charles J. Murray
Assistant Attorney General

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19 February 1976

Subject: Motor Vehicles; Driving Under the
Influence; Breathalyzer Refusal;
Suspension of Operator's License

Requested by: Mr. Carroll L. Spencer
Magistrate
Sampson County

Questions: (1) Does a magistrate have the authority to find no probable cause when a defendant refuses to take the breathalyzer test?

(2) Would a defendant lose his driver's license for six months if the magistrate found no probable cause?

Conclusions: (1) A magistrate can and should find no probable cause when the information presented to him does not establish the necessary elements of the crime charged.

(2) A defendant could lose his motor vehicle operator's license for six months for refusing the chemical test even though a magistrate had found no probable cause.

As to Conclusion (1), the fact that a defendant had or had not taken a chemical test for blood alcohol should not be the deciding factor as to probable cause upon a charge of DUI. Though operating a motor vehicle with a blood alcohol of 0.10 percent or more by weight is unlawful (G.S. 20-138(b)), the fact that there has been no chemical test or that the test results show less than 0.10 percent or more blood alcohol by weight should not be the controlling factor as to a finding of probable cause in a DUI case. The act that is made unlawful under the provisions of G.S. 20-138(a) is the operation of a motor vehicle upon any highway or public vehicular area of this State by any person who is under the influence of intoxicating liquor. Under G.S. 20-138(b), it is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight.

The courts have interpreted the words "under the influence of intoxicating liquor" as set out in G.S. 20-138(a) to mean that a

person is under the influence of intoxicating liquor when he has drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. *State v. Carroll*, 226 NC 237; *State v. Bunn*, 283 NC 444. If the testimony of the officer as to the facts establishes that the accused has consumed a sufficient amount of alcohol to appreciably impair his mental or bodily faculties or both, probable cause exists and any reference to chemical test by whatever means or the lack thereof is immaterial. It is to be noted that operating a vehicle on the public streets and highways while under the influence of alcoholic beverage was a violation prior to the advent of chemical test such as the breathalyzer. In fact, it is becoming quite evident that too many officers are relying too much on the chemical test for alcohol and too little on their powers of observation.

As to Conclusion (2), the provisions of G.S. 20-16.2 are not dependent on the magistrate finding probable cause on the charge of operating a motor vehicle while under the influence nor upon the action of the trial court if probable cause is found. Any action of the Division of Motor Vehicles pursuant to the provisions of G.S. 20-16.2 is however, reviewable by the Superior Court upon appeal.

When an appeal is taken to the Superior Court, if the court finds that the arresting officer had reasonable grounds to believe the person arrested was operating a vehicle upon a highway or public vehicular area while under the influence of alcoholic beverage, was properly warned of his rights and willfully refused the designated chemical test, the action of the Division of Motor Vehicles may be sustained regardless of the action taken by the magistrate.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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25 February 1976

Subject: Municipalities; Public Building Contracts;
Changes and Additions

Requested by: Mr. Broxie J. Nelson
Raleigh City Attorney

Question: May a municipality, after having received bids for the construction of a municipal building which are lower than was anticipated and the contract having been awarded, then make changes and additions to enhance the quality and appearance and to reduce the maintenance costs, of the building at a cost of approximately \$560,000 from funds the municipality had available when the contract was awarded, or must competitive bids be advertised for such work?

Conclusion: The negotiation of a contract for such additional work is in violation of G.S. 143-129, which requires competitive bidding.

The facts according to a letter of January 21, 1976, from the Attorney for the City of Raleigh are that the City initially budgeted about \$11,000,000 for the construction of a Civic Center building; after public advertising, the City entered into a contract with the low bidders for the construction of a Civic Center for the amounts of: (1) \$6,688,900 (General Construction); (2) \$737,694 (mechanical); (3) \$325,952 (plumbing); and (4) \$745,600 (electrical) for a total of \$8,498,146. The low bid for the construction of the Civic Center was less than the architect's estimate of the cost, making additional funds available. The City Council now desires to make changes in the plans which would enhance the quality and appearance of the Civic Center and reduce maintenance costs. The cost of the work will be paid from the remaining funds available. If the municipality now advertises for competitive bids and awards the contract for the alterations to a different contractor, the current

general contractor will face difficulties in scheduling work load and determination of responsibility for work in the completion of the project within the time specified for performance. The City Council requested an opinion as to whether or not the City may negotiate with the present general contractor for certain additions and changes amounting to \$560,140. The contract, as advertised contained a number of items with alternates which were included in the contract awarded, but there were no alternates involving items on the list of proposed changes.

The list of proposed changes includes 28 items, the cost of which ranges from \$650 for addition of coat hooks to dressing areas, to \$231,000 to change the concrete floor finish to monolithic terrazzo. Other additions on the list include vinyl wall fabric (\$66,000), compressed air (\$30,000), 480-volt bus plugs (\$28,000), four following spot lights for stair towers (\$28,000), 120/240 volt plugs, remote outlets and extensions (\$25,000), 1 1/2 inch rigid insulation to all exterior walls (\$18,000), and a drapery tract (\$18,000). There are other similar additions proposed, the cost of which total \$120,000. The list submitted, however, is not final and the Chairman of the Civic Center Authority advises that some of the additions may be dropped and others added to the list.

Section 12.1 of the general conditions of the contract entered into provides for changes in the work. That section provides that "*the owner, without invalidating the contract, may order changes in work within the general scope of the contract* consisting of additions, deletions or other revisions, the contract sum and the contract time being adjusted accordingly. All such changes in the work shall be authorized by change order, and shall be executed under the applicable conditions of the contract documents." (Emphasis supplied.)

G.S. 143-129 requires competitive bidding for contracts for the construction of public buildings. That statute provides that "no construction or repair work requiring the estimated expenditure of public money in an amount equal to or more than \$10,000...except in cases of special emergency involving the health and safety of the people or their property, shall be performed, nor shall any contract be awarded therefor...by any...county, city, town or other subdivision of the State, unless the provisions of this section are

complied with." The requirement of competitive bidding in the letting of municipal contracts is uniformly construed as mandatory and jurisdictional and nonobservance will render the contract void and unenforceable. *Raynor v. Commissioners of Louisburg*, 220 N. C. 348, 351 and 352; *Teer v. State Highway Commission*, 265 N. C. 1, 10.

The only statutory exception provided in G.S. 143-129 from the competitive bidding requirements for construction or repair work in excess of \$10,000 is in the case of a "special emergency involving the health and safety" of people or property. The proposed work greatly exceeds the \$10,000 established by G.S. 143-129 as the amount determinative of competitive bidding. No such special emergency exists involving the health and safety of people and property to bring the work within the statutory exception to the competitive bidding requirements. However, the courts appear to have recognized and engrafted a further exception in cases of unforeseen work or extra work for which there was no bid price in the original contract when necessary to complete the contracted work.

In *Teer v. State Highway Commission*, 265 N. C. 1, the question was raised as to whether or not the payment for extra work which was not specified in the work advertised and for which there was no contract price was in violation of the competitive bidding requirement of G.S. 136-28. The Supreme Court noted "that this extensive remedial work, according to Teer's contention and as evidenced by payments to Teer based upon estimates, greatly exceeded the \$1,000 established by G.S. 136-28 as the amount determinative of the necessity for public advertisement for bids and competitive bidding." 265 N.C. at 12. The Court stated further:

"This statement, supported by cited cases, appears in 135 A.L.R. 1266: 'In general, but subject to certain limitations and exceptions which are considered in subsequent subdivisions of this annotation, *statutes requiring the letting of public contracts to the lowest bidder are regarded as rendering invalid and unenforceable subsequent agreements to pay one to whom a public contract has been duly awarded additional compensation for extras or additional labor*

and materials not included in the original contract, at least *where the additional compensation exceeds the amount for which public contracts may be made without competitive bidding.*" (Emphasis supplied.) *Teer v. State Highway Commission*, 265 N.C. at 10.

The question, after being raised in the Supreme Court was then presented in the Court of Appeals in the case of *Teer v. Highway Commission*, 4 N.C. App. 126. The pertinent text of the opinion of the Court of Appeals is quoted as follows:

"The cost of this extra remedial work exceeded, many times, the sum of \$1,000. *The question arises as to whether such could be done under the existing Contract or whether G.S. 136-28 required the letting of a contract for this remedial work to a bidder after advertisement.*" 4 N.C. App. at 133. (Emphasis supplied.)

The Court of Appeals then quoted the provisions of G.S. 136-28 and the foregoing statement appearing in 135 A.L.R. 1266 quoted by the North Carolina Supreme Court. The contract in the *Teer* case contained provisions for alterations and extra work found desirable or necessary to complete the work. The *Teer* Company, in undertaking to perform its contract, was frequently unable to proceed as scheduled on account of the prior contractor's failure to perform properly the rough grading, drainage, and shoulder work. The existence of these were unanticipated. These adverse conditions were mostly hidden and could be discovered only in piecemeal fashion as the *Teer* Company attempted to carry out its paving work. The Court of Appeals concluded:

"We are of the opinion and so hold that upon a proper interpretation of the Contract in the light of the opinion of the Supreme Court in *Teer Co. v. Highway Commission*, *supra*, and in the light of the circumstances here, the extra remedial work to repair, construct, and perform properly the rough grading, drainage and shoulder work, that had been improperly and inadequately done by the contractor on Project 8.13437, could properly be performed under the

existing Contract on Project 8.13438 and was, under the facts and circumstances of this case, such 'Extra Work' or 'Unforeseen Work' as referred to and defined in the Contract between the parties hereto on Project 8.13438."

"This holding, however, should not be interpreted to mean that by calling it 'Extra Work', the Commission can circumvent the provisions of G.S. 136-28 requiring the letting of bids after advertisement. This cannot be done. What is meant by 'Extra Work' as used in the Specifications of the Commission will have to be determined under the facts and circumstances of each particular case. In the case before us and under the circumstances shown, we think that necessity demanded and the Contract permitted that the extra remedial work required to remedy the deficiencies in the rough grading Project 8.13437 be classified as 'Extra Work' and performed under the Contract on Project 8.13438." 4 N.C. App. at 132 (Emphasis supplied.)

The general rule is that public officers have no authority to make or allow material or substantial changes in any of the terms of the proposed contract after bids are in. 64 Am. Jur. 2d, Public Works and Contracts, Sec. 66; Annotation, *Public Contracts*, 65 ALR 835; 19 R.C.L. 1070; Vol. 4, Antieau, *County Law*, Sec. 39.08, page 232; 3 Yokley, *Municipal Corporations*, Sec. 442, Note 136; 10 McQuillin, *Municipal Corporations*, Sec. 29.72, page 416. To permit material or substantial changes in the terms of the proposed contract would prevent real competition and could lead to a favoritism and fraud which the competitive bidding statutes are designed to prevent. 41 N.C.A.G. 392.

However, G.S. 143-129 makes an exception to the general rule and provides for negotiations with the lowest responsible bidder after competitive bidding for reasonable changes in the plans and specifications as may be necessary to bring the contract price "within the funds available". The General Assembly made no provisions for negotiations for additional work or changes at additional cost after the bids are opened in such cases where the municipality finds it

then has funds available which can be used to enhance the esthetics or quality of the building. Did the Legislature intend that this be accomplished by contract provisions? We think not.

The circumstances which prompted the proposed changes were known before the contract was awarded. Changes in the plans could have been made at that time, and the contract readvertised. In the case of *Morse v. Boston*, 148 NE 1813, cited in the Annotation in 135 ALR 1265, the court said the "argument of inconvenience arising from the possibility of having two different contractors working on the same job, if there must be another advertisement and award of contract under the statute, is not impressive. Mere inconvenience does not warrant departure from a statutory mandate."

In applying the principals of law of the *Teer* case to the facts at hand, it does not appear under the circumstances shown that necessity demands such changes requiring an additional expenditure of approximately \$560,000 now be made in the plans in order to complete the work called for in the contract as advertised. The consequences of the construction of G.S. 143-129 to permit unlimited changes in the plans for the purpose of enhancing the esthetics and quality of the building could easily circumvent and strip the statute of its effectiveness. It would be a vain thing for the Legislature to mandate safeguards for the public treasury to govern the initial execution of the contract and yet to permit all the evils thus prohibited, to be accomplished by alterations of such contract when once executed. Therefore, as the work does not come within the statutory exception nor special emergencies and it does not come within the exception provided by the court in the *Teer* case, it is the opinion of this Office that G.S. 143-129 prohibits the negotiation of the contract with the prime contractor for such alterations and changes proposed.

There are several items included in the list of proposed changes or additions which appear to involve electrical contracting work and one item which appears to involve plumbing contracting work, the total cost of which is approximately \$100,000. Of course, in addition to G.S. 143-129, the provisions of G.S. 143-128, which require separate contracts for those classes of work with firms regularly engaged in the respective lines of work and G.S. 87-25

and G.S. 87-48, which respectively require a Plumbing and Heating Contractors License and an Electrical Contractors License to perform those classes of work, must be complied with.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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26 February 1976

Subject: Taxation; Excise Stamp Tax on
Conveyances; Release of Lot Subject to
Deed of Trust; G.S. 105-228.29

Requested by: Mr. P. Eugene Price, Jr.
Forsyth County Attorney

Question: Where A gives deed of trust to T, trustee
for B, covering four lots, and then sells one
lot to P, securing therefor a quitclaim deed
from T and B releasing that lot from the
lien of the deed of trust, is the transaction
evidenced by the quitclaim deed subject to
the excise stamp tax on conveyances?

Conclusion: No, assuming that P paid A the full
purchase price for the lot, and that A paid
B for the release.

You have stated the following facts:

"A gives a deed of trust to B, savings and loan
association, and T, trustee on several severable tracts
of land. Subsequent to this transaction, A, the
equitable owner of the land, sells one tract to P, a
purchaser for value and conveys title to him by deed.
Subsequent to this transaction, B, savings and loan
association, and T, trustee, convey any interest they
may have by quitclaim deed to P, purchaser for value,
thereby releasing the property from the deed of trust."

Whether the foregoing transaction is subject to the excise stamp tax on conveyances depends upon the method of dealing between the parties. G.S. 105-228.30 imposes a stamp tax measured by the consideration or value of the interest paid. However, G.S. 105-228.29 excludes from the tax any transfer "where no consideration in property or money is due or paid by the transferee to transferor".

We believe that the usual manner of handling partial releases from mortgages is that the purchaser pays the seller in full for the lot purchased. The seller secures a release from the lender, for an amount determined between them. The tax on the deed from A to P is measured by the full consideration paid by P. However, P, the transferee, pays no consideration to B and T and thus, under G.S. 105-228.29, there is no tax due on that transaction. If it were otherwise, more than 100% of the tax, measured by consideration paid-by the transferee to the transferor, would be paid- a result not required by the statute.

Of course, if the transaction is handled differently, then a tax may be due on both the deed and the quitclaim. For example, if P agrees to pay \$10,000 for a lot and pays A \$6,000 and pays B and T \$4,000 for the quitclaim, then a tax, measured by consideration paid would be due on each transaction. In that case, however, no more than 100% of the consideration is used to measure the tax.

Rufus L. Edmisten, Attorney General
Myron C. Banks,
Special Deputy Attorney General

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1 March 1976

Subject: Motor Vehicles; Personnel; G.S. 20-185(b),
(c), (d), (e) and (f)

Requested by: Mr. Edward L. Powell
Commissioner of Motor Vehicles

Question: Are uniformed weigh station personnel of
the License and Theft Section of the

Division of Motor Vehicles, classified as vehicle inspection officers, entitled to the benefits provided under G.S. 20-185(f) in light of former Commissioner Boyd Miller's order of January 25, 1974?

Conclusion: Uniformed weigh station personnel classified as vehicle inspection officers are not entitled to the benefits of G.S. 20-185(f) as it now appears.

We are informed that when the Theft Bureau was originally created by the Legislature, the officers assigned to the Theft Bureau were known as automobile inspectors. Around 1960, due to reclassification by State Personnel, the job titles for the plain clothes' officers, originally called automobile inspectors, were changed to Law Enforcement Officer I, Law Enforcement Officer II, and Law Enforcement Officer III. These officers still carry the work designation of inspectors. These officers are peace officers with statewide jurisdiction in those matters set forth in G.S. 20-49.

When the permanent weigh stations were established in 1951 or 1952, uniformed personnel were assigned to these stations (G.S. 20-183.10) and designated by State Personnel as Weigh Station Operator's I, Weigh Station Assistant Supervisors, and Weigh Station Supervisors. In the early 1960's, as a result of a reclassification, the job titles were changed by State Personnel to Vehicle Inspection Officers I, Vehicle Inspection Officers II, and Vehicle Inspection Supervisors. The officers assigned to the weigh stations have limited jurisdiction. "The uniformed officers assigned to the various permanent weighing stations *shall have the powers of peace officers in making arrests, serving process, and appearing in court in all matters and things relating to the weight of vehicles and their loads.*" G.S. 20-183.10. (Emphasis supplied.)

An attempt or attempts have been made, without success, to amend G.S. 20-185(b), (c), (d), (e) and (f) so as to bring the officers manning the weigh stations within the purview thereof. Therefore, as set forth above, we must conclude that uniformed weigh station personnel, under G.S. 20-183.10, are not covered under G.S. 20-185(b), (c), (d), (e) and (f), and that former Commissioner

Boyd Miller's order of January 25, 1974, exceeded his authority and was to no avail.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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4 March 1976

Subject: Criminal Law and Procedure; Arrest;
Warrant; Uniform Criminal Extradition
Act; Probable Cause, Police Information
Network, G.S. 15A-733

Requested by: Det. Sgt. Harold Caudle
Lexington Police Department

Question: May information obtained at the National
Crime Information Center - Police
Information Network, the receipt of which
is sworn to in an affidavit of a law
enforcement officer who received the
information, be sufficient grounds for
issuance of a fugitive warrant under
G.S. 15A-733?

Conclusion: Yes, information which is obtained and
verified through the National Crime
Information Center - Police Information
Network, the receipt of which has been
sworn to before a judicial official in an
affidavit by a law enforcement officer who
received the information, is sufficient
grounds for the issuance of a fugitive
warrant under G.S. 15A-733.

G.S. 15A-304(d) provides:

"A judicial official may issue a warrant for arrest only
when he is supplied with *sufficient information*,

supported by oath or affirmation, to make an independent judgment *that there is probable cause to believe that a crime has been committed* and that the person to be arrested committed it." (Emphasis supplied.)

This section further provides that a showing of probable cause may be shown by either or both (1) an affidavit or, (2) the taking of evidence by a judicial officer. The judicial officer must have presented to him information from which he can decide that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it. The information on known criminals, which is contained in the National Crime Information Center - Police Information Network, has been shown to be very reliable. It is obtained by various organized law enforcement agencies; both state and federal, who then assemble the data in sophisticated computers which connect with all other states. The information contained in the data banks of the National Crime Information Center - Police Information Network is consistently monitored, updated, and purged, in order that it will be as thorough and correct as possible. In fact, the National Crime Information Center - Police Information Network has been shown to be the most reliable informant that the forces of law enforcement have in the fight against crime, and the information which is obtained through the National Crime Information Center - Police Information Network, must be sufficient for a judge to base decision on whether or not probable cause exists.

The data banks maintained by the National Crime Information Center - Police Information Network contain information associated with the law enforcement and criminal justice activities of North Carolina and the nation. The data consists of such information as criminal history, stolen articles, stolen vehicles, wanted and missing persons, and boat registration. Each state or federal agency has the responsibility of insuring the accuracy of the data records within its files. The only purpose in collecting the information is for conducting official law enforcement and/or criminal justice business in a more organized and effective manner.

With regard to wanted persons, there are only two categories that are listed in the data banks of NCIC-PIN:

(1) Those individuals for whom federal warrants are outstanding;

(2) Those individuals who have committed or have been identified with an offense which is classified as a felony or misdemeanor under the existing penal statutes of the jurisdiction originating the entry, and felony or misdemeanor warrant has been issued for the individual with respect to the offense which was the basis for the entry.

These categories insure that the information disseminated pertained only to those persons with pending criminal charges.

In addition, there is a procedural safeguard that insures the reliability of the information obtained from the NCIC-PIN system. When the NCIC-PIN inquiry produces affirmative information concerning outstanding criminal charges or process, the law enforcement officer (dispatcher) immediately confirms the information by contacting the originating agency or state and inquiring as to the status of the criminal charges. The procedure of double checking the information with the originating agency or state decreases the possibility of an unwarranted arrest. Because the information contained in the NCIC-PIN system is constantly monitored and updated to insure accurate information, the information coming in through the NCIC-PIN system is therefore very reliable.

The sworn statement of the terminal operator, or law enforcement officer verifying the information through the NCIC-PIN system would satisfy the requirement of G.S. 15A-733 that "a credible person" charged under oath, and before a judge, or magistrate of this State that a person in this State has committed a crime in another state and has fled from justice. Also, the NCIC-PIN printout itself, while not being an "affidavit" in the formal sense, is a document with very reliable contents and it supplies satisfactory information from the pertinent law enforcement agency of the demanding state, upon which to base a fugitive warrant. (Appendix Extradition, 1975 Cumulative Supplement, p. 182).

Therefore, this Office is of the opinion that information which is received through the NCIC-PIN system, the origin of which is sworn

to by the person receiving the printout, is proper information upon which a judicial official may base a finding of probable cause and issue a fugitive warrant.

Rufus L. Edmisten, Attorney General
T. Lawrence Pollard
Associate Attorney

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12 March 1976

Subject: Motor Vehicles; DUI Conviction

Requested by: The Honorable Edward K. Washington
District Court Judge
18th Judicial District

Question: Would a bond forfeiture not vacated be considered a conviction for the purposes of the 10 year limitation on prior conviction for driving license purposes?

Conclusion: Yes. For the purposes of Article 2 of Chapter 20 of the General Statutes, a bond forfeiture not vacated is equivalent to a conviction. G.S. 20-24(c).

G.S. 20-24(c) reads as follows:

"(c) For the purpose of this Article the term 'conviction' shall mean a final conviction. Also, for the purposes of this Article a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction. Also, a defendant shall be treated for the purposes of this Article as having been convicted of any offense under this Chapter as to which he:

(1) Has been served with process under

Article 17, Criminal Process, Chapter 15A of the General Statutes;

(2) Has failed to appear upon due call of the case; and

(3) Has failed within 90 days thereafter to submit himself to the jurisdiction of the court to answer the charge." (Emphasis supplied.)

G.S. 20-179(b) (5) reads as follows:

"(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina."

Although a bond forfeiture not vacated within 10 years of a current conviction would appear to have no effect on the provisions of G.S. 20-179(a) relating to the criminal punishment for driving under the influence, it would be a bar to the issuance of a limited permit pursuant to the provisions of G.S. 20-179(b), as same is for all practical purposes equivalent to a driver's license. Any other interpretation would, in effect, repeal various provisions of Article 20 of Chapter 20 by implication.

Rufus L. Edmisten, Attorney General
William W. Melvin
Special Deputy Attorney General

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2 March 1976

Subject: Legality of Internships and Ride-along Programs

Requested by: Mr. Scott Perry
Associate Director
Criminal Justice Training and Standards Council

Questions: What are the legal aspects of non-sworn interns participating with correctional and police agencies in their day to day tasks such as the "Ride-along" program?

In particular:

(1) Who is liable for the actions of interns in the above mentioned situations

(2) Should interns sign releases from the agency that they are associated with

Conclusion: The interns and correctional and police agencies are liable under certain circumstances for the actions of the student-interns. Releases would have little legal effect in this situation.

The individual student-intern would be liable for any negligent actions on his part which result in injury or damage to other persons or property.

Unless the correctional or police agency is immune from suit, it would be liable under certain circumstances for the actions of the student-intern. The agency is required to exercise reasonable care in all its actions, including placing qualified and properly trained persons in the position of carrying out its duties. Although the student-intern would not be sworn, and would not be a full time employee, he would be working with police or correctional officers in their day to day tasks. Depending upon the actual activities the student is allowed to take part in, he will be performing acts authorized by the agency and acts in furtherance of the business of the agency, and he would be acting within the apparent authority of the agency.

The correctional or police agency may also be liable for injuries to the student-intern while participating in a "ride-along" program. Since the student is not being paid or under contract, he would probably not fall within the definition of "employee" and, thus, would not be covered under Workmen's Compensation. There is

case, however, in which a claimant who had been deputized was injured while attempting to aid a policeman in serving a warrant. The court held that this was enough to make the claimant an "employee" and the injury compensable. By authorizing the student-intern to participate in police activities the agency may be bringing the student-intern under its Workmen's Compensation coverage.

If not liable under Workmen's Compensation the agency could be liable in tort for any of its actions which were the cause of injuries to the student-intern.

The police officer or employee with whom the student-intern is aiding may be liable for any negligent actions of the student-intern which result in injury to the student-intern.

Having the student-intern sign a release would have little legal effect. The release would in no way relieve the agency of liability for the actions of the student-intern. The release would also be of little effect in relieving the agency of its liability for injuries to the student-intern. The student would receive no value for signing the release and there would be a certain amount of pressure on the student-intern to sign the release in order to participate in the program.

Depending upon the particular programs involved and the scope of the activities the student-intern is allowed to participate in, both the student and the agency will be liable for the negligent actions on the part of the student-intern. The agency should also be prepared to accept liability for injuries to the student suffered while participating in such programs.

Rufus L. Edmisten, Attorney General
Elisha H. Bunting, Jr.
Associate Attorney

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2 March 1976

Subject: Social Services; Effect of Adoption of
Adults Under Statutory Provisions
Applicable to Adoption of Minors

Requested by: Dr. Renee P. Hill, Director
N. C. Department of Human Resources
Division of Social Services

Question: Is the adoption of an adult valid if initiated, processed, and completed under the statutory provisions for the adoption of minors?

Conclusion: The adoption of an adult under the statutory provisions applicable to the adoption of minors would be invalid.

In prior opinions (41 N.C.A.G. 599 (1971) and 41 N.C.A.G. 918 (1972)) this Office has sanctioned the validity of adoption instituted on a minor and processed to fruition under the statute pertinent to the adoption of minors irrespective of the fact that the adoptee attained majority prior to the entry of the final order of adoption. The question addressed by these opinions has now been carried a step further to focus on the validity of adoptions initiated, processed, and completed under the provisions applicable to the adoption of minors even though the prospective adoptee is an adult at the time the petition for adoption is filed.

G.S. 48-36 sets forth the procedure for the adoption of persons who are 18 or more years of age. It is our interpretation of this law, particularly in view of G.S. 48-36(c), that an adult adoption must be initiated, processed, and completed under the procedure outlined therein. We do not believe that the General Assembly in enacting G.S. 48-36 sought to afford an optional procedure for the adoption of adults. Surely the language of G.S. 48-36(c) makes this patently obvious:

"...the provisions of this Chapter which are not a part of this section shall not apply to the adoption of persons who are more than 18 years of age."

Accordingly, it is our opinion that the adoption of persons who are 18 or more years of age shall only be pursuant to G.S. 48-36. If such an adoption is not effected under this law, error is committed and the adoption would be invalid and subject to attack under

G.S. 48-28 or under Rule 60 of the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rule 60.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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12 March 1976

Subject: State Departments, Institutions and
Agencies; Administrative Procedure Act;
Filing of Regulations

Requested by: Mr. A. C. Davis
Controller
Department of Education

Question: The Department of Education participates in certain federally sponsored school food service programs and has filed rates of reimbursement under these programs as rules with the Attorney General. Where the United States Department of Agriculture alters the reimbursement rates, must a rule-making proceeding be conducted by the Department of Education to implement these reimbursement rates?

Conclusion: The Department of Education may substitute the mandatory prescribed rates without conducting a rule-making hearing.

The Department of Education has set forth in its rules a schedule of reimbursement rates under the National School Lunch Program, School Breakfast Program and Child Care Food Program. The United States Department of Agriculture, effective January 1, 1976 (41 F. R. 1610) altered the reimbursement rates effective for State participants in the programs if states are to continue their participation in the programs, then reimbursement payments must be made at those rates.

G.S. 150A-9 provides in part:

"It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules."

G.S. 150A-10 provides in part:

"As used in this Article, 'rule' means each agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency."

G.S. 150A-58(b) provides in part:

"As used in this Article, 'rule' means every rule, regulation, ordinance, standard, and amendment thereto adopted by any agency...."

G.S. 150A-59(2) provides in part:

"Rules adopted by any agency on or after February 1, 1976, shall be filed with the Attorney General."

The critical language in each of these provisions is "adopted by any agency". This language connotes active decision-making on the part of the agency required to make the filing. In this instance the agency decision which requires filing is the decision to participate in the federally sponsored program. The reimbursement rates have already been subjected to any required federal process, and it would be useless to conduct further rule-making proceedings to implement those rates at the State level, since the rates are mandatorily prescribed by the federal government, and since the only question which might fruitfully be raised in such a proceeding is one of whether the Department of Education will participate in the programs.

We, therefore, conclude that the reimbursement rates are not "rules" required to be filed by G.S. 150A-59. While we do not wish to

discourage the filing of such rules for informational purposes, this rule may, in our opinion, be amended or withdrawn at will by the Department of Education.

The situation here is to be sharply distinguished from other situations involving State rule-making pursuant to federal command. If a federal rule requires adoption of a rule within a range, or requires rules governing a subject matter to be adopted, or requires rules or a plan to be adopted which meet certain minimum standards or which conform to certain guidelines, then agency action at the State level occurs, and Articles 2 and 5 of Chapter 150A govern the proceedings and requires filing of the rules so made.

Rufus L. Edmisten, Attorney General
David S. Crump
Associate Attorney

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15 March 1976

Subject: State Departments, Institutions and
Agencies; Department of Administration;
Public Parking Facilities; Authority to
Purchase Property and Liability Insurance;
Immunity from Suit

Requested by: Mr. William T. Biggers
Department of Administration

Questions: (1) Can the State enter into an insurance
contract for loss caused by damage to or
destruction of a parking facility or any part
thereof?

(2) Will it be necessary for the State to
obtain a comprehensive public liability
insurance policy on the parking system for
bodily injury and property damage or are
we protected under the Tort Claims Act
and Sovereign Immunity?

Conclusions:

(1) The State may enter into insurance contracts covering losses to its property pursuant to the provisions of Article 21 of Chapter 58 of the General Statutes and Section 11 of Chapter 875 of the 1975 Session Laws.

(2) It will not be necessary for the State to obtain comprehensive public liability insurance on a parking facility established pursuant to the provisions of Chapter 858 of the 1975 Session Laws.

The Secretary of the Department of Administration, hereafter referred to as "Secretary," is authorized pursuant to the provisions of Chapter 858 of the 1975 Session Laws, hereafter referred to as the "Act," to acquire property and construct a parking facility for the use of State employees and the general public within the State government complex. To finance the cost of the project, he is authorized to issue revenue bonds and enter into trust agreements with a corporate trustee, which agreements provide for the assignment of revenues to pay the indebtedness represented by said bonds.

Section 4(9) of the Act authorizes the Secretary to carry insurance on the project from the North Carolina State Property Fire Insurance Fund in such amounts and covering such risks as the Commissioner of Insurance may deem advisable. In our opinion, this section authorizes the Secretary to obtain fire and extended coverage insurance and any other type of insurance covering a peril to property deemed advisable by the Commissioner of Insurance (although reference is made only to the "fire insurance fund").

In our opinion, Section 4(9) of the Act applies only to insurance which indemnifies against loss as a result of injury to or destruction of the property itself and does not refer to insurance indemnifying against the liability imposed by law.

It is further our view that with regard to the power of the Secretary to obtain insurance, Sec. 4(9) of the Act is controlling over Sec. 4(10) unless a determination is made that liability insurance is

necessary pursuant to the provisions of the trust agreement provided for in Sec. 6 of the Act.

"Where one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is later enacted." 7 Strong, *N.C. Index*, 2d, "Statutes", Sec. 5, p. 73

We have no reason to believe (1) that the operation of this particular parking facility would not be construed to be the exercise of a governmental function; (2) that a tort claim arising out of the operation of the parking facility (even if construed to be the exercise of a proprietary function) would not be subject to the provisions of Article 31 of Chapter 143 of the General Statutes (the tort claims act); (3) that, in any event, the parking facility would be subject to execution to satisfy a money judgment; or (4) that the rights of the holders of the revenue bonds would be impaired by a tort claim arising out of the operation of the parking facility.

See, generally, *Smith v. State* (N.C. Supreme Court, Spring Term, 1976); *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 723; Annotation: State's Immunity from Tort Liability as Dependent on Governmental Nature of Function," 42 ALR 2d 927; Annotation: Municipal Funds and Credits as Subject to Levy Under Execution or Garnishment on Judgment Against a Municipality," 89 ALR 863; *Casualty Co. v. Commissioners of Saluda*, 214 N.C. 235, 199 S.E. 2d 7.

It is further our opinion that such insurance as is authorized to be purchased by the Act is subject to the provisions of Section 1 of Chapter 875 of the 1975 Session Laws which provides as follows:

"All insurance and all official fidelity and surety bonds authorized for the several departments,

institutions, and agencies shall be effected and placed by the Insurance Department, and the cost of such placement shall be paid by the department, institution, or agency involved upon bills rendered to and approved by the Insurance Commissioner."

Rufus L. Edmisten, Attorney General
Isham B. Hudson, Jr.
Assistant Attorney General

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16 March 1976

Subject: State Departments, Institutions and Agencies; Department of Public Education Community Colleges and Technical Institutes; Authority of the State Board of Education to Promulgate Annual Leave, Sick Leave, Maternity Leave, Funeral Leave and Holiday Policy for Community Colleges and Technical Institutes; Chapter 115A of the General Statutes

Requested by: The Honorable W. D. (Billy) Mills
Member of the Senate
N. C. General Assembly

Question: Does the State Board of Education have the authority to promulgate a uniform annual leave, sick leave, maternity leave, funeral leave and holiday policy for Community Colleges and Technical Institutes organized and administered pursuant to Chapter 115A of the General Statutes?

Conclusion: Yes.

The State Board of Education has recently adopted a uniform policy which provides maximum leave times which may be allowed

employees of community colleges and technical institutes for annual leave, sick leave, maternity leave, funeral leave and holiday leave. The policy provides that the Board of Trustees of the individual institution may not exceed the maximum leave times established by the State Board, but may, by the adoption of a uniform policy, reduce the amount of leave authorized in the policy when in the judgment of the Board of Trustees it is in the best interest of their institution or their employees. The leave policy becomes effective July 1, 1976.

Community colleges and technical institutes are organized and administered pursuant to Chapter 115A of the General Statutes of North Carolina. G.S. 115A-5 provides in pertinent part:

"115A-5. *Administration of institutions by State Board of Education; extension courses; personnel exempt from State Personnel Act; contracting, etc., for establishment and operation of extension units of community college system; use of existing public school facilities.*—The State Board of Education may adopt and execute such policies, regulations and standards concerning the establishment and operation of institutions as the Board may deem necessary to insure the quality of educational programs, to promote the systematic meeting of educational needs of the State, and to provide for the equitable distribution of State and federal funds to the several institutions.

* * *

The State Board of Education shall establish standards and scales for salaries and allotments paid from funds administered by the Board, and all employees of the institutions shall be exempt from the provisions of the State Personnel Act. The Board shall have authority with respect to individual institutions: to approve sites, buildings, building plans, budgets; to approve the selection of the chief administrative officer; *to establish and administer standards for professional personnel*, curricula, admissions, and graduation; to regulate the awarding

of degrees, diplomas, and certificates; to establish and regulate student tuition and fees and financial accounting procedures." (Emphasis supplied.)

Based upon the supervisory and administrative authority granted to the State Board of Education by the General Assembly as evidenced in G.S. 115A-5, particularly those portions above quoted, it appears that the State Board has the authority to promulgate a uniform leave policy setting forth maximum leave times for institutions administered pursuant to Chapter 115A. This is particularly true because the leave policy adopted is an attempt by the State Board "to provide for the equitable distribution of State and federal funds to the several institutions" and "to establish and administer standards for professional personnel".

Rufus L. Edmisten, Attorney General
Andrew A. Vanore, Jr.
Senior Deputy Attorney General

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17 March 1976

Subject: Criminal Law and Procedure; Police Processing and Duties Upon Arrest; Commitment of Defendant to Detention Facility

Requested by: Mr. W. Boyce Rogers
Chief Jailer
Transylvania County

Questions: (1) May a person who is under arrest be placed in jail before the magistrate has completed commitment orders if said person becomes violent, abusive, or otherwise difficult to handle?

(2) May a person who has been convicted of a crime be committed to jail on a verbal order of the presiding judge?

Conclusions: (1) Yes.

(2) Yes.

The length of time an arrested person may be held before he is taken before a judicial officer by the arresting officer has been the subject of much litigation and legislation. It has long been the rule in North Carolina that the arrested person should be taken as soon as possible before a judicial officer. If a judicial officer is not immediately available, the arresting officer has some limited discretion as to what to do with the arrested person. In *State v. Freeman*, 86 N.C. 683, 685-686 (1882), the Supreme Court of North Carolina stated the following:

"...(W)hat is the officer to do with the offender when he shall have been arrested without warrant? All the authorities agree that he should be carried, as soon as conveniently may be, before some justice of the peace. And if he is arrested at a time and under such circumstances as he cannot be carried immediately before a justice, the officer may keep him in custody, commit him to jail or the lockup, or even tie him, according to the nature of the offense and the necessity of the case. (citations omitted)"

In *Freeman*, the court found that it was not unreasonable for an officer to place in jail an individual who was highly intoxicated without taking him before a judicial official when the arrest occurred late at night. See also *State v. Pillow*, 234 N.C. 146, 66 S.E. 2d 657 (1951).

It is clear, however, that the police officer's discretion has not been without limit. Under the pre-existing North Carolina statutory provisions (prior to the passage of the Pretrial Criminal Procedure Act effective September 1, 1975), it was required that the arrested person be taken before a magistrate "immediately," "as soon as may be," or "forthwith." G.S. 15-20, 15-46. In *Hobbs v. Washington*, 168 N.C. 293, 84 S.E. 391 (1915), the court held that an arresting officer can be held liable for wrongful delay where the person arrested was detained overnight without having been seen by a

magistrate and no emergency conditions existed. See also *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971).

North Carolina General Statutes 15-20 and 15-46 were repealed by Chapter 1286, Section 26 of the 1973 Session Laws. The General Assembly at that time passed the Pretrial Criminal Procedure Act which became Chapter 15A of the General Statutes effective September 1, 1975. Under the new Criminal Procedure Act, "police duties upon making arrests, while stated more completely, remain essentially unchanged." Billings, *Pretrial Criminal Procedure Act: Scope and Objectives*, 10 *Wake Forest Law Review* 353, 357 (1974). The duties of the arresting officer upon arrests are now codified as G.S. 15A-501, which provides in subsection (2) that the officer must take the person arrested before a judicial official "without unnecessary delay." G.S. 15A-511 provides for the procedures to be used during this "initial appearance" before the magistrate, while G.S. 15A-521 provides that the arrested person may be committed to a detention facility if he is not released pursuant to Article 26 of Chapter 15A, which provides for pretrial release.

The Attorney General can find nothing in Chapter 15A of the General Statutes or case law which would prohibit the confinement of an arrested person before he is taken before a magistrate if the arrested person becomes violent, abusive, or otherwise too difficult to handle. The test to be used in each situation is whether or not the arresting officer's delay in taking the arrested person before the magistrate is excusable as a necessary delay. As stated by Professor L. Poindexter Watts in an article for the *Wake Forest Law Review*:

"G.S. 15A-501(2) replaces the previous requirements that the person arrested be taken before the magistrate 'forthwith' or 'immediately...or...as soon as may be' with the terminology most favored in this country: 'without unnecessary delay.' Use of 'without unnecessary delay' means that a wealth of case law from other jurisdictions will be available to North Carolina judges attempting to interpret the statute." Watts, *The Pretrial Criminal Procedure Act: The Subchapter on Custody*, 10 *Wake Forest Law Review* 417, 425 (1974).

The American Law Institute's Proposed Official Draft for a Model Code of Prearrest Procedure, dated April 15, 1975, also uses the language "without unnecessary delay" in its section outlining procedures for the disposition of arrested persons (§130.2). In the Commentary to the text of the Proposed Official Draft, at page 333, it is noted that the reason an arrested person should be brought before a judicial official without unnecessary delay is to separate the decision to arrest from the decision to charge. The Commentary indicates that a limited period of detention would be authorized if there were appropriate safeguards for the rights of the arrested person.

In the treatise, *Criminal Procedure for the Law Enforcement Officer* (1975), Maine Assistant Attorney General John N. Ferdico lists, at pages 33 and 34, several instances in which an arresting officer could delay in bringing an arrested person before a magistrate. Among those listed are the physical or mental incapacity of the arrested person due to illness or drunkenness, and the unavailability of a magistrate. Ferdico reasons that the wording "without unnecessary delay" or other similar language should be given a flexible interpretation, in light of all the attendant circumstances. "If the officer brings the arrested person before a magistrate as soon as one is available, and does not detain him to coerce a confession from him or otherwise harrass him, the requirements of the rule should be satisfied." *Ferdico, supra*, at page 33. It is obvious that it may be necessary for the arresting officer to confine the arrested person when there is a necessary delay before he can be brought before the magistrate:

"In these situations, it is the duty of the officer to keep the arrested person safely in custody for the necessary period of time until he can be brought before a magistrate. For this purpose, the officer may exercise such degree of control over the prisoner as may be necessary to prevent his escape, although he must not subject him to any greater restraint than is reasonably justified to keep him safely in custody. It may become necessary for the law enforcement officer to physically confine the prisoner rather than keep him in the officer's personal custody. Ordinarily the place of confinement will be a jail..." *Ferdico, supra*, at page 34.

Included among those jurisdictions which use the language "without unnecessary delay," are the State of California and the United States, in the Federal Rules of Criminal Procedure. In California, Sections 825, 849 and 859 of the California Penal Code use the language "without unnecessary delay." The California cases interpreting this statutory language indicate that a necessary delay would not be in violation of the statutory provisions. See, for example, *People v. Combes*, 14 Cal. Rptr. 4, 363 P. 2d 4 (1961); *In re Walker*, 112 Cal. Rptr. 177, 518 P. 2d 1129 (1974); and *King v. Fitzharris*, 311 F. Supp. 400 (C.D. Cal. 1970). The California decisions also indicate that only necessary delays will be permitted. In *People v. Stroble*, 36 Cal. 2d 615, 226 P. 2d 330 (1951), the court held that the defendant's constitutional and statutory rights had been violated where the defendant was not taken before a magistrate until the morning after the day of his arrest, although the municipal court was open for business and was located in the same building in which the defendant was held for questioning. In *People v. Haydel*, 115 Cal. Rptr. 394, 524 P. 2d 866, 870 (1974), the court noted that "a delay of even a few hours may be unnecessary," and held that a one and one-half hour detention under the circumstances of that case was in violation of the statute.

In *Mallory v. United States*, 354 U.S. 449, 1 L.Ed. 2d 1479, 77 S.Ct. 1356 (1957), the Supreme Court of the United States discussed the effect of Federal Rule of Criminal Procedure Rule 5(a), which states that a person arrested shall be taken before the nearest available commissioner without unnecessary delay. In that case, the court reversed the conviction of a defendant who was arrested in the early afternoon and held at headquarters within the vicinity of numerous committing magistrates. Instead of taking the defendant before one of those magistrates, the police subjected him to questioning and a "lie-detector" test. The Supreme Court noted, however, that some circumstances may justify a brief delay between arrest and appearance before a magistrate:

"The duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience." 354 U.S. at 455.

Therefore, it is apparent that a reasonable interpretation of the new North Carolina Statutes would allow an arrested person to be jailed

before he is viewed by a magistrate or while the magistrate is completing the commitment papers if he becomes so violent or difficult to handle that his safety or the safety of others is threatened.

The rules for committing a convicted defendant to jail are much more readily ascertainable. A person who has been convicted of a crime may be ordered to jail immediately by the sentencing judge without commitment orders being issued by another judicial official. "After a conviction or a plea, the court has power: (1) to pronounce judgment and place it into immediate execution; (2) to pronounce judgment and suspend or stay its execution; (3) to continue prayer for judgment." *State v. Thompson*, 267 N.C. 653, 655, 148 S.E. 2d 613 (1966). In this State, in criminal cases other than capital cases, the failure of the judge or the clerk to sign the judgment does not affect the validity of the judgment. *State v. Dawkins*, 262 N.C. 298, 300, 136 S.E. 2d 632 (1964); *State v. Atkins*, 242 N.C. 294, 297, 87 S.E. 2d 507 (1955).

Rufus L. Edmisten, Attorney General
Jack Cozort
Associate Attorney

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19 March 1976

Subject: State Departments, Institutions and
Agencies; Department of Administration;
Parking; North Carolina Parking Facilities;
Revenue Bond Act

Requested by: Mr. William T. Biggers
Assistant to the Secretary
Department of Administration

Question: Does the Secretary of the Department of
Administration have authority to set rates
to be charged for parking spaces in facilities
within the boundaries of the State
government complex?

Conclusion:

Yes.

G.S. 143-340(18) authorized the Secretary of the Department of Administration to adopt reasonable rules and regulations, subject to the approval of the Governor and Council of State, with respect to parking on all public grounds. It makes no reference to the collection of fees for rental of parking spaces although it contemplates the allocation of parking spaces to State agencies. No specific statutory authority respecting parking rental fees appears.

G.S. 143-34(18)J. authorized the Department to establish specific services and "other central services" and to establish charges for their use pursuant to the following subdivision K. Subdivision K. authorized the Department to require State employees to utilize central facilities and with approval of the Governor and Council of State to adopt rules governing the charges to be made for the services. This general language is the nearest thing that has been found to a statutory grant of authority to regulate rental fees for parking spaces in State-owned lots prior to June 25, 1975.

On June 25, 1975, House Bill 1264 was ratified and became Chapter 858, Session Laws of 1975. Entitled "An Act to Establish Financing Authority For A Parking Deck Within The State Government Complex", its purpose is to allow the issuance of revenue bonds to finance additional parking facilities.

Parking rentals receipts will maintain the project and pay the principal and interest on the bonds.

Section 3(3) of the Act defines the word "Project" as including any facilities within the State government complex operated by the Department for the parking and storage of vehicles.

In order to insure payment of the bonds, Sec. 7 of the Act authorizes the Secretary to "fix, revise, charge and collect fees, rents and charges for the use of and for the services and facilities furnished by the project or any portion thereof on any time basis he deems appropriate and to contract with any person, partnership, association or corporation desiring the use of any part or all thereof, and to fix the terms, conditions, fees, rents, and charges for such use".

In view of this express special enactment, it is our opinion that the Secretary of the Department of Administration has the authority to set rates for parking rentals in these facilities.

Rufus L. Edmisten, Attorney General
T. Buie Costen
Special Deputy Attorney General

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30 March 1976

Subject: Criminal Law and Procedure; Commitment
of Federal Prisoners to North Carolina Jails

Requested by: Special Agent Louis A. Giovanetti
United States Department of Justice
Federal Bureau of Investigation

Question: Do the laws of North Carolina require that
a local magistrate issue a commitment
order before a military deserter or other
federal prisoner can be accepted for
detention in the local or county jails of this
State?

Conclusion: No. Detention of federal prisoners in
local jails is not included in the coverage
of North Carolina G.S. 15A-521.

The General Assembly of North Carolina has provided for federal
prisoners to be housed in North Carolina jails:

"When a prisoner is delivered to the keeper of any
jail by the authority of the United States, such keeper
shall receive the prisoner, and commit him accordingly;
and every keeper of a jail refusing or neglecting to
take possession of a prisoner delivered to him by the
authority aforesaid shall be subject to the same pains
and penalties as for neglect or refusal to commit any
prisoner delivered to him under the authority of the
State...." N.C.G.S. 162-34.

It is not imperative that a prisoner be convicted of a State crime in a State court before commitment to a local jail. In *Sutton v. Williams*, 199 N.C. 546, 548, 155 S.E. 160 (1930), the court noted that it was the duty of the officer to receive a federal prisoner and commit him to the common jail of Craven County when the prisoner had been convicted of a crime in the District Court of the United States for the Eastern District of North Carolina and committed to the Sheriff of Craven County. Thus, it would seem that commitment of a federal prisoner to a local jail would be proper if the prisoner were presented under the authority of the United States.

The procedure for confining military deserters and other federal prisoners in local jails does not have to comply with the commitment procedures established by Article 25 of Chapter 15A of the General Statutes, the new Criminal Procedure Act. In an article for the *Wake Forest Law Review*, L. Poindexter Watts, one of the consultant-draftsmen of the Criminal Code Commission which proposed the new Criminal Procedure Act, made the following observation:

"The caption of the section describes its scope: 'Commitment to detention facility pending trial.' The section deals with the commitment of defendants and material witnesses pending trial, but does not purport to cover any additional situation. The other cases in which a person may lawfully be incarcerated would apparently continue to be covered by the applicable statute or case law." Watts, *The Pretrial Criminal Procedure Act: The Subchapter on Custody*, 10 *Wake Forest Law Review*, 417, 441 (1974).

The General Assembly has established separate provisions for committing defendants and material witnesses pending trial, under Article 25 of Chapter 15A of the General Statutes; and for federal prisoners, under the previously enacted G.S. 162-34. The two enactments are not irreconcilable, i.e., one provides for criminal defendants pending trial and the other for federal prisoners, and it is the duty of the court to give effect to both. See *Duke Power Company v. Clayton*, 274 N.C. 505, 164 S.E. 2d 289 (1968).

Article 25 of Chapter 15A has not repealed G.S. 162-34 by implication. Speaking for the Supreme Court of North Carolina in *D & W. Inc. v. Charlotte*, 268 N.C. 577, 151 S.E. 2d 241 (1966), app. op. 268 N.C. 720, 152 S.E. 2d 199 (1966), Sharp, J., wrote the following:

"Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnance between them, or unless the new law is evidently intended to supercede all prior acts on the manner in hand and to comprise in itself the sole and complete system of legislation on that subject." (citation omitted) 268 N.C. at 590.

Although criminal defendants and material witnesses pending trial must be committed to detention facilities by the provisions of Article 25 of Chapter 15A, G.S. 162-34 provides that federal prisoners may be detained in local jails if presented to the jailer under the authority of the United States.

Rufus L. Edmisten, Attorney General
Jack Cozort
Associate Attorney

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30 March 1976

Subject: State Departments, Institutions and
Agencies; Department of Human
Resources; Department of Administration;
Requirement for Certifying Updating of
Agency Publications

Requested by: Mr. David T. Flaherty
Secretary
Department of Human Resources

Question: Do the provisions of Chapter 362, Session
Laws of North Carolina, 1975 Session,

require that annual certification be made of the review, updating and correction of the publications "Interchange" and "EMS News"?

Conclusion: Such certification is not required as to "Interchange" but is required as to "EMS News".

The Department of Human Resources prepares and distributes the following two publications:

(a) "Interchange"--a house organ for Department of Human Resources' employees; it is circulated for the most part in bulk deliveries to the Divisions and Regional Offices of the Department, although some copies are mailed to Department of Human Resources' institutions and local agencies.

(b) "EMS News"--a technical bulletin circulated to professional workers in Emergency Medical Services such as hospitals, ambulance and rescue personnel, and local government officials who are called on to support these types of activities.

Chapter 362 (originally House Bill 13) as enacted by the 1975 Session of the General Assembly requires that the public document mailing list of State Agencies be reviewed, updated and corrected annually and that certification of this accomplishment be made to the Director of the Budget. The term "public document" is defined in the enacting legislation as "any annual, biennial, regular or special report or publication of which at least 500 copies are printed for distribution by mail to the *general public*." (Emphasis supplied)

Looking to the publication "Interchange", it apparently is designed to fulfill a special need of a specific group (largely internal) and is distributed only to those persons within that group. Thus, inasmuch as it is not designed for distribution to the general public, it falls outside the ambit of Chapter 362. Conversely, however, the wide distribution contemplated for and given to "EMS News" appears to bring it within the type of publications which the General Assembly intended to cover by Chapter 362.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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April 1976

Subject: Social Services; Welfare Fraud;
G.S. 108-48 vis-a-vis G.S. 14-100

Requested by: The Honorable L. F. Faggart
District Court Judge
19th Judicial District

Question: Should the State proceed under G.S. 14-100 or G.S. 108-48 in charging or seeking the indictment of a public assistance applicant, recipient, or provider accused of welfare fraud? (A provider of public assistance, generally is one who the "welfare recipient" furnishes items or services to an individual for which payment is or may be made in whole or in part out of State and/or federal funds under a social welfare program.)

Conclusion: In the case of a public assistance applicant or recipient accused of welfare fraud, the State should proceed under G.S. 108-48. In the case of a public assistance provider accused of welfare fraud, the State should proceed under G.S. 14-100.

G.S. 108-48 reads as follows:

"§ 108-48. *Fraudulent misrepresentation.*—Any person who willfully and knowingly, with the intent to deceive, makes a false statement or representation or fails to disclose a material fact in order to enable himself or another person to obtain or to continue to receive (public) assistance to which he is not

entitled, is guilty of a misdemeanor, and upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court."

G.S. 14-100, rewritten by Chapter 783 of the 1975 Session Laws and entitled "obtaining property by false pretenses", provides *inter alia*:

"If any person shall knowingly and designedly by means of any kind of false pretense whatsoever...obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, and shall be imprisoned in the State's prison not less than four months nor more than 10 years, and fined, in the discretion of the court... (p)rovided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in action, or other thing of value by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the money, goods, property, services, chose in action or other thing of value; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud."

Apparently, public assistance applicants and recipients accused of securing welfare fraudulently are now being charged under either of the above statutes. The question has arisen as to what law the State should actually be proceeding under in cases of welfare fraud. Of significance is the fact that a violation of G.S. 14-100 constitutes a felony while a conviction or plea of guilty under G.S. 108-48 constitutes only a misdemeanor.

In *State v. Hutson*, 10 N. C. App. 653, 179 S.E. 2d 858 (1971), the North Carolina Court of Appeals stated the following legal maxim:

"Statutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are *in pari materia*...Statutes *in pari materia*, although in apparent conflict or containing apparent inconsistencies, should, as far as reasonably possible, be construed in harmony with each other so as to give force and effect to each; but if there is an irreconcilable conflict, the latest enactment will control, or will be regarded as an exception to, or qualification of, the prior statute."

In our judgment there is no irreconcilable conflict between G.S. 14-100 and G.S. 108-48. Hence, both statutes must be given full force and effect. However, it is palpably obvious that G.S. 108-48 is aimed specifically at the public assistance applicant or recipient (or his representative). G.S. 14-100, on the other hand, is not so limited. Accordingly, applying another rule of statutory construction that "(w)here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is later enacted." (7 Strong, N. C. Index 2d, Statutes, §5, p. 73) It is our opinion that G.S. 108-48 should govern in instances of applicant or recipient fraud.

With respect to public assistance provider fraud, however, which is encompassed by G.S. 108-48 only under a somewhat strained interpretation, we would submit that the aforementioned rule of statutory construction is inapplicable and that the State should proceed under G.S. 14-100.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

15 April 1976

Subject: Motor Vehicles; Driver's License; Limited Driving Privilege

Requested by: The Honorable Fred A. Hicks
Judge, District Court Division

Question: Can a limited driver's license be granted pursuant to G.S. 20-179(b)(1) where there is a prior bond forfeiture in South Carolina as opposed to a judicial determination of guilt?

Conclusion: A limited driver's license cannot be granted if there has been a prior valid bond forfeiture which has not been vacated.

G.S. 20-24(c) provides:

"(c) For the purpose of this Article the term 'conviction' shall mean a final conviction. Also, for the purposes of this Article a forfeiture of bail or collateral deposited to secure a defendant's appearance in Court, which forfeiture has not been vacated, shall be equivalent to a conviction. Also, a defendant shall be treated for the purposes of this Article as having been convicted of any offense under this Chapter as to which he:

(1) Has been served with process under Article 17, Criminal Process, Chapter 15A of the General Statutes;

(2) Has failed to appear upon due call of the case; and

(3) Has failed within 90 days thereafter to submit himself to the jurisdiction of the court to answer the charge.

In addition to the foregoing provisions and for the purpose of this Article, a third or subsequent prayer for judgment continued within any five-year period shall be considered as a final conviction and to this end all orders entering prayer for judgments continued entered by the courts shall be reported to the Division of Motor Vehicles."

G.S. 20-23 provides:

"§ 20-23. *Suspending resident's license upon conviction in another state.*—The Division is authorized to suspend or revoke the license of any resident of this State upon receiving notice of the conviction as defined in G.S. 20-24(c) of such person in another state of the offenses hereinafter enumerated which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator or chauffeur. The provisions of this section shall apply only for the offenses as set forth in G.S. 20-26(a)."

G.S. 20-179(b) provides, in relevant part:

"(b)(1) Upon a first conviction only, the trial judge may when feasible allow a limited driving privilege or license to the person convicted for proper purposes reasonably connected with the health, education and welfare of the person convicted and his family. For purposes of determining whether conviction is a first conviction, no prior offense occurring more than 10 years before the date of the current offense shall be considered. The judge may impose upon such limited driving privilege any restrictions as in his discretion are deemed advisable including, but not limited to, conditions of days, hours, types of vehicles, routes, geographical boundaries and specific purposes for which limited driving privilege is allowed. Any such limited driving privilege allowed and restrictions imposed thereon shall be specifically recorded in a written judgment which shall be as near as practical to that hereinafter set forth and shall be signed by the trial judge and shall be

affixed with the seal of the court and shall be made a part of the records of the said court. A copy of said judgment shall be transmitted to the Division of Motor Vehicles along with any operator's or chauffeur's license in the possession of the person convicted and a notice of the conviction. Such permit issued hereunder shall be valid for such length of time as shall be set forth in the judgment of the trial judge. Such permit shall constitute a valid license to operate motor vehicles upon the streets and highways of this or any other state in accordance with the restrictions noted thereon and shall be subject to all provisions of law relating to operator's or chauffeur's license not by their nature rendered inapplicable.

(3) Upon conviction of such offense outside the jurisdiction of this State the person so convicted may apply to the resident judge of the superior court of the district in which he resides for limited driving privileges hereinbefore defined. Upon such application the judge shall have the authority to issue such limited driving privileges in the same manner as if he were the trial judge.

* * *

(5) This section is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina."

For the purposes of G.S. 20-179(b)(1) a valid bond forfeiture not vacated has the same effect as a judicial determination of guilt.

By valid bond forfeiture it is meant that the bond was posted after arrest or service of process giving the Court jurisdiction over the person of the defendant. See *Carmichael v. Scheidt*, 249 NC 472; *In re Wright*, 228 NC 301; *In re Donnelly*, 260 NC 375; *Rhyne v. Garrett*, 18 NC App 565.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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22 April 1976

Subject: State Departments, Institutions and
Agencies; Public Officers and Employees;
State Employees; Administrative Procedure
Act

Requested by: Mr. Herbert O. Carter
State Purchasing Officer

Question: When a State Employee has a grievance
which arose prior to February 1, 1976:

(1) Is such employee entitled to
treatment of the grievance under Chapter
667 of the 1975 Session Laws?

(2) Is any hearing of the grievance
governed by the Administrative Procedure
Act, G.S. 150A?

Conclusions: (1) The employee is not entitled to
treatment of his grievance under Chapter
667 of the 1975 Session Laws.

(2) The hearing on the grievance must
be conducted in accordance with the
Administrative Procedure Act as modified
by Chapter 667 of the 1975 Session Laws.

Session Laws 1975, Chapter 667, entitled "An Act to Amend
Chapter 126 of the General Statutes of North Carolina, Modifying
the State Personnel System" is, by Section 13 thereof made effective
February 1, 1976. As is said in 2 Sutherland, *Statutes and Statutory
Construction*, § 33.07 (4th Ed. 1974):

"The power to enact laws includes the power to fix a future day on which the act will take effect. A statute with a definite future day fixed for its commencement has effect only from that time."

The provisions of Section 10 of Chapter 667, codified as G.S. 126-17 to 126-20 provide an additional reason that the Chapter cannot be construed to have application to facts occurring prior to its effective date. As Chief Justice Bobbitt said in *Smith v. Mercer* 276 N.C. 329, 337, 172 S.E.2d 489, 494 (1970):

"Ordinarily, an intention to give a statute a retroactive operation will not be inferred. If it is doubtful whether the statute...was intended to operate retrospectively, the doubt should be resolved against such operation. It is especially true that the statute...will be regarded as operating prospectively only...where the effect of giving it a retroactive operation would be to...create a new liability in connection with a past transaction, invalidate a defense which was good when the statute was passed, or in general, render the statute...unconstitutional."

Prior to the effective date of Chapter 667 of the 1975 Session Law the existence of "just cause" was not required *in law* for the discharge, suspension or reduction of pay or position of a state employee. To construe this provision as having retroactive effect is to "create a new liability in connection with a past transaction."

We therefore conclude that an employee dismissed, suspended or demoted before February 1, 1976 has no greater rights on account of the enactment of Chapter 667 of the 1976 Session Laws.

Session Laws 1973, Chapter 1331, now codified as Chapter 150A of the General Statutes, Section 4 provided: "This act shall be effective on and after July 1, 1975, but shall not affect any pending administrative hearings." Session Laws 1975, Chapter 69, Section 4 amends Session Laws 1973, Chapter 1331, Section 4 "by deleting the date July 1, 1975 and inserting in lieu thereof the date 'February 1, 1976.'" Chapter 150A of the General Statutes therefore does not apply to any administrative hearing which was pending on February 1, 1976 and in which proceedings have not yet been

oncluded. Any proceeding initiated after February 1, 1976 must be handled in accordance with Chapter 150A as modified by Session Laws 1975, Chapter 667 §11 irrespective of the date of the occurrence which gives rise to the grievance claimed.

There is nothing inconsistent in these interpretations. As is said in Sutherland, *Statutes and Statutory Construction* § 40.04 (4th Ed. 1974):

"(W)here a new statute deals only with procedure, *prima facie* it deals with all actions - to those which have accrued,...and to future actions."

Mr. Chief Justice Bobbitt in *Smith v. Mercer, supra.*, 276 N.C. at 38, 172 S.E.2d at 495 (1970) recognized the same distinction:

"Hence, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within...the general rule against a retrospective operation of statutes."

Therefore, as to any grievance proceeding in which notice of hearing was given (G.S. 150A-23) or right to appeal exercised (G.S. 126-25 to 126-37), those being the statutory methods for the initiation of proceeding before the State Personnel Commission, on or after February 1, 1976, Chapter 150A as modified by G.S. 126-43 to 126-45 governs the conduct of the proceeding.

The General Assembly has provided that both acts are effective on February 1, 1976. We are of the opinion that this interpretation effectuates that legislative policy in regard to both the new Personnel Act and the Administrative Procedure Act. That this result was within the contemplation of the General Assembly is further buttressed by the fact that the General Assembly made certain judgments about the application of Chapter 150A to the Personnel Commission in enacting the new Personnel Act.

Rufus L. Edmisten, Attorney General
David S. Crump
Associate Attorney

30 April 1976

Subject: Streets and Highways; Subdivision Streets
Secondary Road Standards; Disclosure
Statements

Requested by: Mr. Leon M. Killian, III
Haywood County Attorney

Questions: (1) Do the provisions of G.S. 136-102.6, which require subdivision streets to be designated on plats as public or private and a certificate of approval by the Division of Highways as to public streets, apply to a subdivision plat or map now offered for recordation, but dated prior to October 1, 1975 (the effective date of the Act)?

(2) Is the "Disclosure Statement" required of G.S. 136-102.6 applicable to conveyances from subdivisions offered for recordation after October 1, 1975?

Conclusions: (1) Yes. A subdivision plat or map, includes a new street or the changing of an existing street not previously dedicated and which is offered for recordation after the effective date of the Act, must comply with the plat requirements of G.S. 136-102.6 even though the subdivision plat or map is dated prior to the effective date of the Act.

(2) A Disclosure Statement should be furnished by developer before each sale of subdivision lots made after the effective date of the Act, October 1, 1975.

G.S. 136-102.6(a) provides that the owner of a tract or parcel of land "which is subdivided from and after the effective date" of the

act which includes a new street or the changing of an existing street, shall record a plat or map of the subdivision. No conveyance can be made with reference to the plat prior to the recording of such plat. Subsection (b) provides that the status of such streets delineated upon the subdivision plat or map offered for recordation must be designated to be either public or private. Streets designated as public must meet minimum standards established by the Secondary Roads Council as evidenced by a certificate of approval issued by the District Engineer of the Division of Highways. G.S. 136-102.6(c) and (d).

The foregoing plat requirements apply only to those tracts of land subdivided after the effective date of the Act which include a new street or the changing of an existing street. As a general rule, when land is divided into lots according to a map or plat showing streets, and lots are sold with reference to the map or plat, nothing else appearing, *the owner thereby dedicates the streets to the use of the purchasers, and those claiming under them, and also to the public.* *Steadman v. Pinetops*, 251 N.C. 509; *Todd v. White*, 246 N.C. 59, 3 N.C. Index 2d, Dedication Section 1, page 232. The stated purpose of the Act is to insure "that new subdivision streets described herein to be dedicated to the public will comply with" State secondary road standards. G.S. 136-102.6(i). Therefore, it is the opinion of this Office that when these sections of the Act are read in conjunction with each other and the general subdivision law is applied, the foregoing plat requirements apply to all plats which contain new streets or changes in existing streets which have not previously been dedicated.

Subsection (f) of G.S. 136-102.6 provides that prior to entering into an agreement or any conveyance with the prospective buyer, the developer will sign and prepare a statement which shall disclose the status (whether public or private and the responsibilities for maintenance if the road is private) of the street which the road fronts on. An expressed purpose of the Act as indicated in subsection (i) is to insure that full and accurate disclosure of the responsibility for construction and maintenance of private streets be made. Therefore, it is the opinion of this Office that a Disclosure Statement should be made by a developer involving all conveyances or agreements for the sale of subdivision lots after the effective date of the Act. However, the certification of conformance with the right

of way and design standards of secondary roads required in subsection (f) is only applicable to those public roads which were offered for dedication after the effective date of the Act, October 1, 1975.

Rufus L. Edmisten, Attorney General
Eugene A. Smith
Special Deputy Attorney General

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3 May 1976

Subject: Social Services; Confidentiality of Public Assistance Records; G.S. 108-45

Requested by: Dr. Renee P. Hill
Director
North Carolina Division of Social Services

Questions: (1) May the monthly public assistance recipient check register transmitted to each county auditor by the Department of Human Resources pursuant to G.S. 108-45(b) be copied, either by hand or mechanically, by a private citizen?

(2) May a copy of this register of information derived therefrom be published by the news media?

Conclusions: (1) The monthly public assistance recipient check register is "a public record open to public inspection during the regular office hours of the county auditor (G.S. 108-45(b)), and, therefore, may be copied, either by hand or mechanically, by a private citizen. However, the "register of the information contained therein may not be used for any commercial or political purpose." G.S. 108-45(b).

(2) Neither a copy of the register nor information derived therefrom may be published by the news media.

G.S. 108-45(a) proscribes, generally, the procurement, disclosure, or use of information respecting public assistance applicants or recipients "except for purposes directly connected with the administration of the programs of public assistance..." Such a confidentiality provision is required both by the Social Security Act and the rules and regulations promulgated by the United States Department of Health, Education and Welfare. However, by virtue of Section 618 of Public Law 82-183, states were afforded the option of enacting legislation under which public access could be had to records of disbursement of welfare funds as long as the legislation prohibited the use of any lists or names obtained through such access to such records for commercial or political purposes.

In accordance with Public Law 82-183, as implemented by the federal regulation found at 45 CFR § 205.50(e), the State of North Carolina enacted G.S. 108-45(b):

"The Department of Human Resources shall furnish a copy of the recipient check register monthly to each county auditor showing a complete list of all public assistance recipients, their addresses, and the amounts of the monthly grants. This register shall be a public record open to public inspection during the regular office hours of the county auditor, but said register or the information contained therein may not be used for any commercial or political purpose. Any violation of this section shall constitute a misdemeanor."

Since the register is a public record available for public inspection and since G.S. 132-6 directs a custodian of public records to "furnish certified copies thereof on payment of fees as prescribed by law," it is our conclusion that the monthly public assistance recipient check register may be copied, either mechanically or by hand, in the offices of the county auditor.

However, neither the register nor the information therein may be used for *any* commercial or political purpose, and this would

preclude, in our opinion, the publication of the names of public assistance recipients, their addresses, and the amounts of individual monthly grants by the media. In our judgment, such a publication gives rise to a presumption of commercial or political motivation on the part of the news medium involved.

Rufus L. Edmisten, Attorney General
William Woodward Webb
Assistant Attorney General

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6 May 1976

Subject: Utilities; Rural Electrification
Cooperatives; Payment of Prior Owner's
Delinquent Bills Required before Service
Provided to New Owner

Requested by: Mr. J. D. Patterson, P.E.
Administrator
North Carolina Rural Electrification
Authority

Question: May a rural electrical cooperative require
that outstanding bills of a prior owner be
paid before it will furnish electricity to the
new owner of the same building?

Conclusion: No. The rural electrical cooperative may
not require that outstanding bills of a prior
owner be paid before it will furnish service
to a new owner of the same building.

A number of rural electrical cooperatives have adopted and are enforcing a policy that all delinquent bills, including those of an unrelated prior owner, must be paid before electricity will be furnished to a new owner of the same property. New owners are being asked to contact prior owners and persuade them to pay their delinquent bills, thus forcing the new owners either to serve as collection agents for the cooperative or to pay the prior owners

delinquent bills themselves even though they are not liable for those bills. The question has been asked whether the rural electrical cooperatives may legally refuse to provide electricity to new owners until the prior owner's delinquent bills are paid.

It is well-established in this State that a public utility may not discriminate in providing services or in the rates it charges. *State of North Carolina ex rel Utilities Commission v. Mead Corp.*, 238 N.C. 451, 78 S.E.2d 290 (1953); *North Carolina Public Services Co. v. Southern Power Co.*, 179 N.C. 18, 101 S.E. 593, 12 A.L.R. 304, *rehearing dismissed*, 179 N.C. 330, 122 S.E. 625 (1919); *Horner v. Oxford Water & Electric Co.*, 153 N.C. 535, 69 S.E. 607 (1910). G.S. 62-140(a) forbids any public utility including electrical membership corporations to make or grant any unreasonable preference or advantage or to subject any person to an unreasonable prejudice or disadvantage as to rates or services. Moreover, public service corporations have a "common law obligation of equal and undiscriminating service." *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967); *North Carolina Public Service Co. v. Southern Power Co.*, 179 N.C. 18, 101 S.E. 593, 12 A.L.R. 304, *rehearing dismissed*, 179 N.C. 330, 122 S.E. 625 (1919).

No North Carolina case dispositive of this question has been found. The general rule in other jurisdictions is that a public utility or public service corporation cannot refuse service to a new owner because of the unpaid bill of a prior, unrelated owner of the same premises, unless statutes provide the utility or public service corporation with a valid lien on the property for the amount of the unpaid bill. *Price v. Southern Central Bell*, 313 So. 2d 184, 188 (Ala. 1975); *Louisiana Power & Light Co. v. White*, 302 So. 2d 358 (La. C.A. 1975). Annot. 19 A.L.R. 3d 1227; 64 Am. Jur. 2d, Public Utilities, § 67. No North Carolina statute gives the rural electrification cooperatives a lien on the property. As between the rural electrification cooperative and the new owner of the property, a bill for services rendered to a prior owner is a collateral matter, not related to any service to be rendered to the new owner. *Swanson v. City of Deadwood*, 219 N.W. 2d 477 (S.D. 1974). North Carolina follows the general rule that a public utility or public service corporation may not condition service upon a matter collateral to the service sought. *Dale v. City of Morganton*, 270 N.C. 567, 572, 155 S.E.2d 136 (1967). Therefore, it would seem that North

Carolina would also follow the general rule that a public utility or public service corporation cannot require payment of a prior owner's bills before it will provide service to a new owner of the same property.

The electrical membership corporations are, in effect, trying to make a new owner responsible for the prior owner's debts when they require that delinquent bills of a prior owner be paid before they will furnish service to a new owner for the same property. They have no lien on the property to which they furnish electricity, so there is no basis for holding the new owner responsible for the old owner's delinquent bills. Thus, the rural electrification cooperatives cannot lawfully refuse to furnish service to the new owner of property because of unpaid bills owed by the previous owner of the same property.

Rufus L. Edmisten, Attorney General
Norma S. Harrell
Associate Attorney

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6 May 1976

Subject: Jails; Supervision of Local Confinement
Facilities

Requested by: Mr. D. N. Beale
Chief of Police
Roanoke Rapids

Question: Does a local confinement facility meet the requirements of the statute when custodial personnel are not always present but no prisoner is incarcerated any longer than twenty-four hours and the facility is checked at least three times in an eight-hour period by the shift lieutenant and the other officers are in and out of the jail seven or eight times during their shift?

Conclusion: No.

G.S. 153A-224(a) states:

"(a) No person may be confined in a local confinement facility unless custodial personnel are present and available to provide continuous supervision in order that custody will be secure and that, in event of emergency, such as fire, illness, assaults by other prisoners, or otherwise, the prisoners can be protected. These personnel shall supervise prisoners closely enough to maintain safe custody and control and to be at all times informed of the prisoners' general health and emergency medical needs."

It is clear that this statute requires that custodial personnel be "present." Such personnel are required to protect the prisoners "in event of emergency, such as fire, illness, assaults by the prisoners, or otherwise...." A shift lieutenant who checks the confinement facility three times in an eight-hour period and other officers who are in and out of the jail seven or eight times during the shift are not sufficiently "present and available" to protect the prisoners.

In addition, this supervision is not sufficient "to maintain safe custody and control and to be at all times informed of the prisoners' general health and emergency medical needs."

G.S. 153A-224 requires that custodial personnel be continuously present and available in the confinement facilities whenever a prisoner is confined therein.

Rufus L. Edmisten, Attorney General
Isaac T. Avery, III
Associate Attorney

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10 May 1976

Subject: State Departments, Institutions and Agencies; Licenses and Licensing; Board of Cosmetic Arts Examiners; Authority to Require Specific Dimensions for Beauty Salons

Requested by: The Honorable Liston B. Ramsey
Member, House of Representatives
North Carolina General Assembly

Question: Does the State Board of Cosmetic Arts Examiners have authority to adopt and enforce a rule requiring new beauty salons to have minimum dimensions of 14 feet by 15 feet?

Conclusion: No. The State Board of Cosmetic Arts Examiners does not have authority to require that all new beauty salons have minimum dimensions of 14 feet by 15 feet in the absence of a clear showing that such dimensions are necessary for sanitary management.

The State Board of Cosmetic Arts Examiners recently adopted a new rule requiring all new beauty salons to have minimum dimensions of fourteen (14) feet wide and fifteen (15) feet long. The requirement applies also to all beauty salons reopening after being closed more than ninety (90) days or under new ownership, regardless of when they were initially established. These rules have been filed with and accepted by the Attorney General pursuant to N.C.G.S. 150A, the Administrative Procedure Act.

There are approximately 30,000 licensed cosmetologists and 8,000 licensed beauty salons in North Carolina. Board employees estimate that about half of the licensed beauty salons are one-person operations, frequently located in the licensee's home or in a trailer adjacent to the licensee's home. The new rules will make it virtually impossible or a great deal more expensive for licensees to open

beauty shops in their home or trailers and will prevent the sale as beauty shops of a large percentage of existing salons.

The question has been raised whether the Board of Cosmetic Arts Examiners has authority to adopt or enforce a rule requiring specific minimum dimensions of fourteen (14) by fifteen (15) feet for new beauty salons, beauty salons reopened after being closed more than ninety (90) days, and beauty salons under new ownership. Rules adopted by a State agency, such as the Board of Cosmetic Arts Examiners, must be within the statutory authority conferred upon the agency in order to be valid. The rules may not alter or add to the statutes being administered. *States' Rights Democratic Party v. State Board of Elections*, 229 N.C. 179, 49 S.E.2d 379 (1948); 2 Strong's North Carolina Index 2d, Constitutional Law, §7 (1967). A rule which exceeds the agency's statutory authority will be invalidated by the courts. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193, *cert. denied*, 406 U.S. 920, 32 L.Ed.2d 119, 92 S.Ct. 1974 (1971); *Clayton Mutual Burial Association v. Overby Mutual Funeral Association*, 11 N.C. App. 723, 182 S.E.2d 275 (1971).

G.S. 88-23 authorizes the Board of Cosmetic Arts Examiners "to make *reasonable* rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments...and to have such rules and regulations enforced." (Emphasis supplied.) The rules and regulations of the Board deal specifically with such sanitary considerations as cleanliness of operators and operators' clothes, cleanliness of furniture, equipment, and containers, bathroom facilities, water supply, sanitization of combs and brushes, and other matters relating directly to sanitary management. The rules also specify a minimum distance of five (5) feet between the center of one chair and the center of another chair, and two (2) feet between the front or back of a chair and the wall. These regulations provide ample assurance that beauty salons will be operated in a sanitary manner. A safe and sanitary establishment can be operated in a space of less than fourteen (14) by fifteen (15) feet.

The rules requiring new beauty salons, beauty salons under new management, and beauty salons reopened after being closed more than ninety (90) days have little, if any, relationship to sanitary management. G.S. 88-23 requires that all rules providing for the

sanitary management of beauty salons be approved by the Commission for Health Services. The rules requiring minimum dimensions for new beauty salons were returned to the Board without having been acted on by the Commission because they had nothing to do with sanitary management, in the judgment of the Commission staff. These rules are not *reasonable* regulations for the sanitary management of beauty salons, which can be and are provided for by less restrictive requirements more directly related to sanitary considerations. Since they are not reasonable regulations for the sanitary management of beauty salons, the rules specifying minimum dimensions for beauty salons are in excess of the statutory authority of the Board of Cosmetic Arts Examiners and are therefore invalid.

Rufus L. Edmisten, Attorney General
Norma S. Harrell
Associate Attorney

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19 May 1976

Subject: Taxation; Exemptions; Air-Cleaning
Devices and Pollution Abatement
Equipment

Requested by: Mr. Craig Alan Bromby
Enforcement Officer
Department of Natural and Economic
Resources

Question: Whether the installation of two coreless
electric induction melting furnaces in place
of a coke-fired cupola can qualify for the
available tax benefits allowed for certain
air-cleaning devices and pollution
abatement equipment?

Conclusion: The installation of two coreless electric
induction melting furnaces does not

constitute the construction and installation of air-cleaning devices or pollution abatement equipment, as those terms are used in the statutes, so as to qualify for the benefits allowed for such devices or equipment. Even if these furnaces were so considered, a factual finding would have to be made by the Department that the primary purpose of these furnaces is to reduce air pollution, and it appears that such finding would be difficult to justify.

Chapter 105 of the North Carolina General Statutes includes various tax incentives to taxpayers for the construction and installation of "air-cleaning devices" and "pollution abatement equipment." Reserves for the entire cost of such devices or equipment may be treated as a deductible liability in determining corporate franchise tax, pursuant to G.S. 105-122(b) and (d). A deduction for the amortization of such cost, in lieu of any depreciation allowance is provided by G.S. 105-130.10 for corporations and by G.S. 105-147(13) for individuals. Further, real and personal property used exclusively for air cleaning or to abate, reduce or prevent air pollution may be excluded from the tax base, by reason of G.S. 105-275(8). In considering these exemptions, it should be kept in mind that these statutes are strictly construed, when there is room for construction, against the exemption and in favor of taxation. *Overlook Cemetery v. Rockingham County*, 273 NC 467, 160 SE 2d 293 (1968).

In order to qualify for these tax exemptions, the taxpayer, in addition to obtaining a certification from the Department of Natural and Economic Resources (as set out below), must first construct or install an "air-cleaning device" or "pollution abatement equipment." The taxation statutes do not define these terms, but we can be guided by the definition of an "air-cleaning device" contained in G.S. 143-213(1), where it is defined to include "any method, process or equipment which removes, reduces, or renders less noxious air contaminants discharged into the atmosphere." The term "pollution abatement equipment", though not specifically defined, would appear to be included within and substantially synonymous with the definition of an air-cleaning device. (See

previous opinions of this Office to Mr. E. C. Hubbard in 40 N.C.A.G. 781 and 783 (1968- 1970)). These terms obviously have reference to some device or equipment which affects the quality of discharged air contaminants by removal, reduction or other action which render the contaminants less noxious. Coreless electric induction melting furnaces, to the contrary, are devices or equipment which are used to melt metals. In particular, a "furnace" is defined in Webster's New World Dictionary, Second College Edition (1974) as "an enclosed chamber or structure in which heat is produced, as by burning fuel, for warming a building, *reducing ores and metals*, etc." (Emphasis supplied.) It is clear that the coreless electric induction melting furnaces are not "air-cleaning devices" or "pollution abatement equipment", as those terms are defined in the statute and as they are ordinarily understood.

To take this analysis one step further, assuming that these furnaces were considered to be "air-cleaning devices" or "pollution abatement equipment," the taxpayer would be required to obtain from the Department of Natural and Economic Resources a certificate setting out the following findings of fact:

1. That the device or equipment has actually been constructed and installed;
2. That the device or equipment complies with the applicable requirements of the Environmental Management Commission;
3. That the device or equipment is being effectively operated in accordance with the terms and conditions of the applicable permit or approval document; and
4. That the primary purpose of the device or equipment is to reduce air pollution resulting from the emission of air contaminants, and not merely incidental to other purposes and functions.

(The language of G.S. 105-275(8) varies slightly from the other applicable sections, but the information required in the certificate is substantially the same in all cases.)

The principle finding required relates to the "primary purpose" of the device or equipment under consideration. To provide certification, the Department would have to determine that the primary purpose of these furnaces is to reduce air pollution. If there is a reduced amount of pollution, but the reduction is incidental to the other purposes and functions of the device or equipment, that reduction could not be considered the primary purpose. In light of the purpose and function of the furnaces being to melt metals, this Office is of the opinion that a finding that the primary purpose of these furnaces is the reduction of air pollution would be difficult to justify.

Rufus L. Edmisten, Attorney General
Daniel C. Oakley
Associate Attorney

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26 May 1976

Subject: Motor Vehicle Laws; Applicability of
G.S. 20-4.01(32); Public Vehicular Area

Requested by: Mr. Henry A. Harkey
Assistant District Attorney

Question: Is G.S. 20-4.01(32) defining public
vehicular area applicable to a non-State
maintained unrestricted access street two
lanes in width leading from a city street
into a private trailer park which rents and
sells trailer parking areas?

Conclusion: Yes, the definition of public vehicular area
as set forth in G.S. 20-4.01(32) would
cover streets leading into privately owned
trailer parks renting, leasing and selling
trailer parking lots.

G.S. 20-4.01(32) reads:

"(32) Public Vehicular Area.--Any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business, residential, or municipal establishment providing parking space for customers, patrons, or the public."

The definition of public vehicular area uses the words, "or any other business, residential, or municipal establishment providing parking spaces for customers, patrons, or the public." Certainly the access road in question is open to the customers or patrons of the trailer park as well as to the owners of the lots which have been sold and to the visitors of all those in the trailer park. Therefore being accessible for public use, those motor vehicle laws applicable to public vehicular areas as defined in G.S. 20-4.01(32) are applicable thereto; i.e., G.S. 20-138 and 139 (driving under the influence of intoxicating liquor or drugs); G.S. 20-140 (reckless driving); G.S. 20-140.2 (overcrowded or overloaded vehicles); G.S. 20-140.4 (special provision for motorcycles); G.S. 20-141 (speeding); and others. It is to be noted that generally those statutes made applicable to public vehicular areas are safety oriented, thereby justifying the invasion of private property rights. Also see opinions of Attorney General to Mr. C. C. Tarleton, 42 N.C.A.G. 107 (1972) and to Nelson L. Sheppard, 44 N.C.A.G. 314 (1975); and *Highway Commission v. Thornton*, 271 NC 227, at 243.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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11 June 1976

Subject: Motor Vehicles; DUI; Bicycles With Helper Motors; "Mopeds"

Requested by: Mr. Michael F. Royster
Assistant District Attorney
26th Judicial District

Questions: (1) Is G.S. 20-138 (DUI) applicable to persons operating bicycles with helper motors (mopeds)?

(2) What law is applicable to bicycles with helper motors (mopeds) which exceed 20 mph or have a motor of more than one brake horsepower?

Conclusion: (1) Yes.

(2) The same laws applicable to motorcycles would apply to bicycles with helper motors (mopeds) which exceed 20 mph or have a motor of more than one brake horsepower.

The applicable statutes are:

"§ 20-4.01. *Definitions.*--Unless the context otherwise requires, the following words and phrases, for the purpose of this Chapter, shall have the following meanings: . . .

(23) Motor Vehicle.--Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour. . . .

(27) Passenger Vehicles.--

d. Motorcycles.--Vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor-driven bicycles, but excluding tractors and utility vehicles equipped with an additional form of device designed to transport property, three-wheeled vehicles while being used by law-enforcement agencies and bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour. . . .

(49) Vehicle.--Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for the purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application."

"§ 20-50.1 *Certain bicycles with motors exempt.*--Notwithstanding any of the provisions of Chapter 20 of the North Carolina General Statutes, all pedal bicycles with helper motors rated at one brake horsepower or less and incapable of exceeding 20 miles per hour shall be exempt from all title and registration requirements of Chapter 20, provided such bicycles so equipped shall not be operated upon any highway or public vehicular area of this State by any person under the age of 16 years."

§ 20-138. *Persons under the influence of intoxicating liquor.*--(a) It is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State.

(b) It is unlawful for any person to operate any vehicle upon any highway or any public vehicular area within this State when the amount of alcohol in such person's blood is 0.10 percent or more by weight and upon conviction if such conviction is a first conviction under this section, he shall be eligible for consideration for limited driving privileges pursuant to the provisions of G.S. 20-179(b); provided that second and subsequent convictions under this section shall be punishable as provided in G.S. 20-179(a) (2) and (3). An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence."

As to Conclusion No. 1, bicycles with helper motors of less than one brake horsepower which produce only ordinary pedaling speeds up to a maximum of 20 miles per hour are not motor vehicles (G.S. 20-4.01 (23)) and are not subject to the registration provisions of Chapter 20 (G.S. 20-50.1) nor are they motorcycles (G.S. 20-4.01(27)d), but they are vehicles as defined in G.S. 20-4.01(49). By considering all the applicable statutes in *pari materia*, we conclude that a bicycle with helper motor of less than one brake horsepower which produces only ordinary pedaling speeds up to a maximum of 20 miles per hour is subject to all provisions of the motor vehicle laws applicable to bicycles. Therefore, these bicycles fall squarely within the purview of G.S. 20-4.01(49), and the provisions of G.S. 20-138, G.S. 20-179(a) and G.S. 20-17(2) would be applicable to any person who operates same while under the influence of intoxicating beverage.

As to Conclusion No. 2, the exemption to the various sections of Chapter 20 of the General Statutes for bicycles with helper motors of less than one brake horsepower which produces ordinary pedaling speeds *up to a maximum of 20 miles per hour* would not be applicable if the helper motor developed more than one brake horsepower or pedaling speeds in excess of 20 miles per hour and such vehicle would be subject to all the laws governing the operation of motorcycles.

It would appear to us that should questions arise relative to power or speed of such vehicle, it should be tested on a dry level surface under normal conditions.

Rufus L. Edmisten, Attorney General
William W. Melvin
Deputy Attorney General

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11 June 1976

Subject: Social Services; Child Support
Confidentiality of Records; Release of
Information Regarding Address of City
Employee

Requested by: Mr. Charles C. Green, Jr.
Assistant City Attorney
Statesville, North Carolina

Questions: Must city officials having custody of
personnel records of city employees furnish
information regarding the address of a city
employee to:

(1) a designated representative of
the county commissioners charged
with implementation of
G.S. 110-130?

(2) the Department of Human
Resources when it is fulfilling its
functions as levied by G.S. 110-139?

Conclusions: City officials having custody of personnel
records of city employees must furnish
information regarding the address of a city
employee to:

(1) a designated representative of
the county commissioners charged
with the implementation of
G.S. 110-130 when the official
having custody of such records

deems that information to be necessary and essential to the pursuance of a proper function of the designated representative.

(2) the Department of Human Resources when it is fulfilling its functions as levied by G.S. 110-139.

Article 9, Chapter 110 of the North Carolina General Statutes was enacted by the 1975 General Assembly to provide for the support of dependent children; it creates an assignment of the right to the child support to the State and a debt in favor of the State in appropriate situations where payment of public assistance has been made for the support of dependent children. It is also designed to provide: (1) for the location of absent parents; (2) for a determination as to the ability of a responsible parent to support his children; and (3) for enforcement of the responsible parent's obligation to furnish support. G.S. 110-128.

In furtherance of these purposes, G.S. 110-130 authorizes the county commissioners to designate a representative who may:

"...if the mother, custodian, or guardian of the child neglects to bring such action, institute civil proceedings against the responsible parent of the child and may take up and pursue any action commenced by the mother, custodian or guardian for the maintenance of the child, including any ancillary action to establish paternity, if she fails to prosecute to final judgment."

It appears that a question has arisen in a situation where the errant parent is a city employee and information relative to his current address is sought from the city personnel records. G.S. 160A-168(b) sets forth information which may be afforded to the public from personnel records of city employees; the current address of an employee is not an item included within this public information. That section of the General Statutes does further provide, however:

"An official of an agency of the State or federal government, or any political subdivision of the State,

may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be necessary and essential to the pursuance of a proper function of the inspecting agency, but no information shall be divulged for the purpose of assisting in a criminal prosecution (of the employee), or for the purpose of assisting in an investigation of (the employee's) tax liability." G.S. 160A-168(c)(5).

The point has been raised that there are certain statutes making non-support of dependent children a criminal offense; based upon this, it is posited that divulgence of the current address of a city employee under circumstances described in the question is proscribed. The clear language of Article 19, however, refutes such a conclusion. The actions described in and contemplated by Article 19 are "civil" in nature. Thus, the "purpose" of divulgence of information of this sort to authorized individuals seeking to implement Article 19 does not equate to assistance in criminal prosecution. The fact that a non-supporting parent might ultimately be subjected to a criminal action as a collateral matter is certainly non-dispositive of the questions presented.

As to the release of information of this type to the Department of Human Resources, G.S. 110-139 designates the Department as the registry of information directly relating to the location of an absent parent and levies on it the duty of assisting other agencies in locating such parent. That section further specifies:

"In order to carry out the responsibilities imposed under this Article, the Department may request from any governmental department, board, commission, bureau or agency information and assistance. All State, county and city agencies, officers and employees shall cooperate with the Department in the location of parents who have abandoned and deserted children with all pertinent information relative to the location, income and property of such parents, *notwithstanding any provision of law making such information confidential*. All records maintained by the Department pertaining to child support enforcement

shall be confidential, and only duly authorized representatives of social service agencies, public officials with child-support enforcement and related duties, and members of legislative committees shall have access to these records." (Emphasis supplied)

Interestingly, the legislation embodying G.S. 110-139 was ratified by the General Assembly on 25 June 1975, two days after the legislation containing the language found in G.S. 160A-168. In view of the specificity of the language of the later provision, in the event of any conflict G.S. 110-139 must prevail. Significantly, too, the provisions authorizing release of this information by the Department to "public officials with child support enforcement and related duties" manifest even more fully a clear legislative intent that county designated representatives be afforded this type of information in order to fulfill their statutorily prescribed function.

Rufus L. Edmisten, Attorney General
William F. O'Connell
Special Deputy Attorney General

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28 June 1976

Subject: State Departments, Institutions and Agencies; Reorganization; Department of Cultural Resources; Art Commission; Powers and Duties of the Secretary of Cultural Resources and the Art Commission; Article 2, Chapter 143B of the General Statutes; Article 1, Chapter 140 of the General Statutes; G.S. 100-2

Requested by: Mrs. Grace J. Rohrer
Secretary
Department of Cultural Resources

Questions: (1) Who has the final authority over administrative personnel assigned to the Art Museum and the Art Commission and

with regard to budgetary matters and records pertaining to the Art Museum and the Art Commission?

(2) Who has final authority over the works of art in the permanent collection of the Art Museum, including the authority to lend works of art to other institutions and to authorize restoration or sales of works of art?

Conclusions: (1) The Secretary of Cultural Resources.
(2) The Art Commission.

The Department of Cultural Resources was established as a principal State department by the Executive Organization Act of 1973. G.S. 143B-6(1). Under this act, the functions and duties of the North Carolina Museum of Art were transferred to this department, and the Art Commission was created as a part of the department. G.S. 143B-51(b)(6); G.S. 143B-53; G.S. 143B-54.

In an opinion dated February 26, 1976, this Office concluded that the authority to adopt policies, rules and regulations governing the conduct of the Art Museum is vested in the Art Commission. Additional questions, as stated above, have been raised regarding the respective responsibilities and duties of the Art Commission and the Secretary of Cultural Resources.

The Secretary of Cultural Resources, as head of the principal State department, has final authority over all administrative personnel assigned to the Art Museum and the Art Commission. The Secretary is also responsible for all budgetary matters and records pertaining to the Art Museum and the Art Commission. G.S. 143B-10(c), (e), (f) and (g); G.S. 143B-14(a) and (d).

Under G.S. 143B-54, the Art Commission was created as a part of the Department of Cultural Resources with the power and duty to promulgate rules and regulations concerning the "acquisition and disposal of art objects" for the State. G.S. 143B-54(1) provides, in pertinent part, the Commission shall have the following powers and duties:

"(a) In consultation with the Secretary of Cultural Resources, ...to acquire by purchase, gift or will, ... money or other property which may be retained, sold, or otherwise used to promote the purposes of the North Carolina Museum of Art..."

"(b) In consultation with the Secretary of Cultural Resources to exchange works of art owned by the North Carolina Museum of Art..."

"(c) In consultation with the Secretary of Cultural Resources to sell any work of art owned by the North Carolina Museum of Art..."

"(d) To approve prior to acceptance any gift of artistic value given to the State as provided in Chapter 100 of the General Statutes of North Carolina;"

It is clear from the above statutory provisions that the final authority to acquire works of art and to dispose of works of art by sale or exchange is vested in the Art Commission. The Commission is required to consult with the Secretary prior to taking any such action.

Under G.S. 100-2, the Art Commission has the final authority over lending or restoring works of art. That statute provides, in pertinent part:

"100-2. *Approval of memorials before acceptance by State; regulation of existing memorials, etc.;* 'work of art' defined; highway markers.--No memorial or work of art shall hereafter become the property of the State by purchase, gift or otherwise, unless such memorial or work of art or a design of the same, *together with the proposed location of the same*, shall have been submitted to and *approved by the Art Commission* or the North Carolina Historical Commission as appropriate:... No existing memorial or work of art owned by the State shall be *removed, relocated, or altered in any way without approval of the Art Commission* or the North Carolina Historical Commission as appropriate..." (Emphasis supplied.)

The Commission has the additional power and duty to advise the Secretary on matters pertaining to the lending and restoration of works of art. G.S. 143B-54(1) e and f.

Rufus L. Edmisten, Attorney General
Roy A. Giles, Jr.
Assistant Attorney General

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28 June 1976

Subject: Clean Water Bond Act of 1971 (Chapter 909, 1971 Session Laws); Reservation of Funds for Grants; Construction of Act and Construction of Rules and Regulations Governing Grants under the Act.

Requested by: Mr. Jesse L. Warren
City Attorney
Greensboro

Questions: Does the Clean Water Bond Act of 1971, as amended, prohibit the Environmental Management Commission from reserving State bond funds for a city's municipal wastewater treatment project, when an environmental impact statement has been required and has not yet been completed?

Do the rules and regulations governing State grants for wastewater treatment works, wastewater collection systems and water supply systems (1 NCAC Chapter 22) prohibit the reservation of State bond funds for a city's municipal wastewater treatment project when an environmental impact statement has been required and has not yet been completed?

Conclusions:

The Clean Water Bond Act of 1971, as amended, prohibits the Environmental Management Commission from reserving State bond funds for a city's municipal wastewater treatment project, when an environmental impact statement has been required and has not been completed, if the Environmental Management Commission determines that there is insufficient evidence in the applicant's file, when such required environmental impact statement is not included, to determine eligibility or assign priority so as to deem the application as being received.

The rules and regulations governing State grants for wastewater treatment works, wastewater collection systems and water supply systems also prohibit the reservation of State bond funds for a city's municipal wastewater treatment project, when an environmental impact statement has been required and has not been completed, if the Environmental Management Commission determines that there is insufficient evidence in the applicant's file, when such required environmental impact statement is not included, to determine eligibility or assign priority so as to deem the application as being received.

The Clean Water Bond Act of 1971, as amended, was designed to make grants to units of government for construction or improvement of wastewater treatment works, wastewater collection systems and water supply systems. (See Section 7, Chapter 909, Session Laws 1971 General Assembly) Section 9(b) of the Act requires that each applicant shall file with its application an environmental impact statement. However, at the time the Act was passed, the requirements of the National Environmental Policy Act had not been explicitly interpreted by the courts and the distinction between an environmental impact statement and an environmental assessment

had not been fully defined. An environmental assessment is an evaluation by the applicant of the effects the proposed project will have on the environment. An environmental impact statement is a more formal document, prepared after comments made by interested State, federal and environmental groups, concerning the effects the proposed project will have on the environment. An environmental assessment is sufficient to meet the requirements of the Act unless it is determined by the interested federal or State agency that an environmental impact statement is required.

Section 10(a) of the Act provides that an application which does not contain sufficient information to permit the "receiving agency" to determine either the eligibility of the applicant or the priority to be assigned the application shall not be deemed received by the "receiving agency" until such information has been furnished by the applicant. The "receiving agency" is defined in Section 3(4) of the Act to mean the "...Board of Water and Air Resources with relation to receipt of applications for grants for wastewater treatment works or wastewater collection systems." The Environmental Management Commission is the successor State agency to the now dissolved "Board of Water and Air Resources. (G.S. 143-213(7)) Therefore, the Environmental Management Commission is the agency charged with the responsibility for determining the eligibility of the applicant and the assignment of priority for a grant.

Section 7(c) (1) of the Act states that the funds provided by the Act will be used to make grants to pay a portion of the non-federal share of the eligible construction costs of "approved wastewater treatment works projects which qualify for Federal grants." A project can be defined as an "approved project" when the facilities plan for such project has been approved and certified by the Director, Division of Environmental Management. If an environmental impact statement is required, a project cannot be approved for a federal grant until such statement is prepared; and Section 9(b) of the Act requires that every applicant will file an environmental impact statement. Section 8 of the Act sets forth the eligibility requirements for a grant; one of which is that the applicant has "substantially complied or will substantially comply with all applicable laws, rules, regulations and ordinances, federal, State and local."

The question then to be answered is whether a municipality has "complied or will substantially comply with all applicable laws, rules, regulations and ordinances, federal, State and local," if an environmental impact statement is required and such statement has not been completed. In this case, the federal Environmental Protection Agency and the Department of Natural and Economic Resources have required that the applicant file an environmental impact statement and no additional federal grants can be made until such statement has been completed. The next question to be answered is whether there is sufficient information in the application for the "receiving agency" to determine eligibility and to assign priority for a grant. This determination should be made by the Environmental Management Commission, which is the "receiving agency", unless it has delegated such authority to some administrative official.

The Environmental Management Commission has delegated this authority. At a regularly scheduled meeting on December 11, 1975, the Environmental Management Commission, by Resolution 75-54, delegated to the Secretary, Department of Natural and Economic Resources, the authority to "determine eligibility of applicants in accordance with Section 4.0(b) of the 'Rules and Regulations Governing State Grants and Policies of the Commission.'" This Resolution also delegated to the Secretary other duties and further authorized him to "redelegate any or all of the above duties to employees of the Division of Environmental Management." This delegation of State grants authority is compiled and published in 15 NCAC 2F .0308. The Secretary, Department of Natural and Economic Resources, has further delegated to the Chief, Planning and Management Section, Division of Environmental Management, the authority to determine eligibility of grant applicants. 15 NCAC 2A .0006(c) (2). Therefore, the Chief, Planning and Management Section, Division of Environmental Management, must make the determination of whether there is sufficient information in the file to determine eligibility of an applicant and the assignment of priority for a grant.

There is no statutory prohibition in the Act itself to forbid the Environmental Management Commission from reserving State bond funds for a city's municipal wastewater treatment project, if a prior determination of eligibility has been made. To award a grant to

an applicant, the applicant must be determined to be eligible for such a grant. The determination that the applicant has failed to meet federal requirements and therefore is not eligible for a State grant should be made by the designee of the "receiving agency". However, the Environmental Management Commission, may review, if it decides to do so, the factual determination of eligibility made by its designee. In order for the Environmental Management Commission to make a determination that the application is eligible for a grant, it must determine that there is sufficient evidence in the applicant's file, without the inclusion of the environmental impact statement, to determine eligibility and to assign priority so as to deem the application as being received.

We now address the question of whether the rules and regulations governing State grants for wastewater treatment works, wastewater collection systems and water supply systems prohibit the Environmental Management Commission from approving a grant for an applicant, who is required to file an environmental impact statement, and who has not completed such statement.

The rules and regulations governing State grants for wastewater treatment works, wastewater collection systems and water supply systems have been compiled and published in 1 NCAC Chapter 22. Section .0207(a) of those rules and regulations provides that environmental impact statements, if deemed required by the responsible State or federal agency, will be filed with a grant application. Section .0207(e) of those same rules provides that an application which does not contain sufficient information to determine eligibility or to assign priority shall not be deemed as received until such information is furnished. Section .0209 of the rules provides that each application, along with supporting documents, shall be reviewed to determine if the application contains all the required information and meets the eligibility requirements. Section .0207(b) provides that all applications for wastewater treatment works or wastewater collection systems shall be forwarded directly "to the Office of Water and Air Resources." (Now Environmental Management Commission. G.S. 143-213(7)) Section .0207(f) provides that an applicant shall furnish such additional information as required by the Environmental Management Commission. Section .0208(c) provides that if it is determined by the Environmental Management Commission that a project will have

a significant effect on the environment and the questions cannot be resolved with the applicant, the application "shall not be assigned a priority for a grant."

Based upon the above cited rules and regulations, it follows that the "receiving agency", or its delegate, will make the determination of whether an application is complete enough to determine eligibility of an applicant and to assign priority for a grant. The "receiving agency" is defined to be the Environmental Management Commission. As noted above, the Environmental Management Commission has delegated this responsibility to the Secretary, Department of Natural and Economic Resources, who has further delegated it to the Chief, Planning and Management Section, Division of Environmental Management. The official occupying this position must make a determination whether an application contains sufficient information to permit a determination of eligibility of the applicant so as to assign priority for a grant in compliance with 1 NCAC Chapter 22 .0297.

There is no specific authorization in the rules and regulations governing State grants which would authorize the Environmental Management Commission to reserve State bond funds for a city's municipal wastewater treatment project prior to a determination of eligibility having been made. A determination of eligibility should be made by the designee of the "receiving agency." However, the Environmental Management Commission, if it decides to do so, may review the factual determination made by its designee as to whether an impact statement is actually required by the applicant. In order for the Environmental Management Commission to make such a determination, it must first determine that there is sufficient evidence in the applicant's file, without the inclusion of the environmental impact statement, to determine eligibility or to assign priority so as to deem the application as being received.

A memorandum opinion from this Office concerning these identical questions was given to the Division of Environmental Management on March 2, 1976. In that opinion it was stated that the Clean Water Bond Act and the rules and regulations governing the Act provide no options for reserving funds for an applicant pending the completion of an environmental assessment, or an environmental impact statement, if such an assessment or such an impact statement

is required. That opinion is not changed. However, this formal opinion is more specific as to the agency responsible for making the determination of whether an environmental assessment, or an environmental impact statement, is required.

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I N D E X T O A T T O R N E Y
G E N E R A L O P I N I O N S

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